Supreme Court, U.S.
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No. 09-10-95

IN THE

Supreme Court of the United States

SAUNDRA J. COUNCE, R.N.,
Petitioner,

v.

SECRETARY OF THE UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS,
Respondent.

On Petition for a Writ of Mandamus to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF MANDAMUS

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June 30, 2010

QUESTIONS PRESENTED

1. If it is the *law of this case* as held by the Merit Systems Protection Board (MSPB) at the successful urging of Respondent-Appellee VA, that Petitioner-Appellant had no MSPB appeal rights because, as MSPB stated she was "subject to the VA's Disciplinary Appeals Board [DAB] procedure" as the result of her "serving under a permanent appointment" and "therefore . . . DAB had 'exclusive jurisdiction' to review appellant's removal," should principles of respect for the integrity of administrative adjudication demand that Respondent-Appellee VA be ordered to provide Petitioner-Appellant DAB appeal rights because it is *the law of the case*, particularly because it was Respondent-Appellee that persuaded the MSPB to dismiss her MSPB appeal because Petitioner-Appellant had DAB hearing and due process rights?

2. Should the Federal District Court and/or the Sixth Circuit Court of Appeals have applied *judicial estoppel* and ordered VA to stop reversing its positions on Petitioner-Appellant's permanent or probationary employment status (VA made *two reversals*, its *first* was to deny Petitioner-Appellant her MSPB rights, the *second* reversal was after MSPB dismissed her claims and she appealed to VA and was in federal court), after VA was successful in having MSPB refuse to exercise its jurisdiction to provide Petitioner-Appellant any relief because MSPB ruled that Petitioner-Appellant had DAB rights so necessarily she was "VA Permanent," by ordering the parties bound by the MSPB's decision so that *judicial estoppel* and *law of the case* establish in Petitioner-Appellant's case that she has the rights of a non-probationary VA employee before the VA (and in federal court) so she can get the DAB due process hearing she needs to have her claims fairly adjudicated before the VA?

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TIMELINE

1. Petitioner hired under 38 U.S.C. 7405 (a) (1) (A) and began work *June 17, 2001.* (Appendix A and E, p. 5a and 25a.)

2. Probationary period for Respondent's registered nurses hired under Chapter 74 of Title 38 is 2 years (§ 7403 (b) (1) of Title 38) if performance is "satisfactory". (§ 7403 (b) (2).)

3. *April 21, 2002,* Petitioner was re-appointed under 38 U.S.C. 7401 (1), Respondent having "lost" her entry paperwork and then delayed processing it until April 2002. (Appendix A and E, p. 6a and 26a.)

4. *June 17, 2002,* received excellent end-of-first year Proficiency Report. (Appendix F, p. 28a-29a.)

5. About May 20th, 2003 Petitioner's nurse- supervisor prepared and gave her an excellent end-of-second-year Proficiency Report for Petitioner to review, sign, and return to supervisor. (Appendix F, p. 30a-31a.)

6. *May 30, 2003,* Petitioner signed her timely "good" 2nd anniversary Proficiency Report (Attachment F, p. 30a-31a), and returned the supervisor's copy, which "disappeared" and was later substituted for a "bad" Proficiency Report on *August 17, 2003.* (Appendix F, p. 32a-33a.)

7. *June 15, 2003,* Petitioner was designated "permanent" with "tenure" pursuant to 38 U.S.C. § 7403 by an official VA Notification of Personnel Action Standard FORM 50-B, issued to Petitioner at the completion of her probationary period of two-years. (Appendix E, p. 27a.)

8. *August 1, 2003*, Petitioner summoned to appear before Nurse Professional Standards Board, a summary review body that has jurisdiction only over nurses who have not completed the VA's two-year probation. (Appendix G, p. 36a-38a.)

9. When separating Petitioner, *after* she attained her § 7403 permanent appointment, Respondent asserted that her § 7404 (1) appointment status effective *April 21, 2002, re-started* her probationary period, extending it until *April 20, 2004*. (Appendix A, p. 2a, 9a.)

10. *August 21, 2003*, Petitioner was tried and found guilty of unprofessional conduct by a summary hearing procedure used only for "probationaries," despite Petitioner arguing that her due process and fair hearing rights as a permanent VA nurse were denied to her. (Appendix B, p. 11a-13a.)

11. *September 19, 2003*, *"Separation During Probationary Period"* letter, VA declaring unequivocally that Petitioner was probationary and had only the rights she had received from the summary review before the Nurse Professional Standards Board. (Appendix B, p. 11a-13a.)

12. During Petitioner's Appeal at Merit Systems Protection Board (MSPB), Respondent VA successfully argued that Petitioner was a ***permanent*** VA nurse who was entitled to VA's Disciplinary Appeals Board (DAB) procedures; they were her exclusive remedy; and consequently MSPD could not take jurisdiction. (Appendix A, p. 2a-3a, 9a, 17a-18a.)

13. When Petitioner applied to VA for her DAB due process and hearing rights, Respondent denied her any DAB fair hearing rights, for the reason she was "**probationary**," (Appendix D, p. 23a-

24a), the opposite of the necessary assumption Respondent used in successfully arguing for the MSPB to dismiss Petitioner's appeal for lack of jurisdiction. (Appendix C, p. 1a-10a, 17a-18.)

14. Petitioner litigated pro se in the District Court and in the Sixth Circuit Court of Appeals, but was unsuccessful in getting either court to acknowledge the issue of *judicial estoppel* against Respondent VA, or that the MSPB's ruling that she was a permanent VA nurse, is the *law of the case*.

IN THE
SUPREME COURT OF THE UNITED STATES

Saundra J. Counce, R.N., *Petitioner,*	)	
v.	)	ORDER
Secretary of the United States Department of Veterans Affairs, *Respondent.*	)	

By reason of Defendant-Appellee Veterans Administration's successful arguments to the United States Merit Systems Protection Board, Petitioner's claims were foreclosed from adjudication before that administrative body. Additionally, Defendant-Appellee's arguments and positions were the cause of the holding by the Merit Systems Protection Board, creating the law of this case, that Petitioner is entitled to the hearing and associated due process rights afforded by the Disciplinary Appeals Board procedures provided to Title 38 Veterans Administration employees who completed their probationary periods of employment and were permanent employees of the Veterans Administration.

For the above reasons the Sixth Circuit Court of Appeals is ORDERED to remand this case to Defendant-Appellee Veterans Administration who shall be Ordered to provide to Petitioner the rights that Defendant-Appellee provided to its registered nurses who were permanent employees as of September 2003, by reason of completing the probationary period of employment required by Section 7403(a)(2)(e) and Section 7403(b)(1) of Title 38 United States Code.

ENTERED BY ORDER OF THE SUPREME COURT OF THE UNITED STATES.

Signed: *Date*

IN THE

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No. 09-___

SAUNDRA J. COUNCE, R.N.,
Petitioner,

v.

SECRETARY OF THE UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS,
Respondent.

On Petition for a Writ of Mandamus to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF MANDAMUS

JURISDICTION

A *mandamus* is an order to a public agency or governmental body to perform an act required by law when it has neglected or refused to do so.

The writ of mandamus will issue only in extraordinary circumstances. *See Sporck v. Peil*, 759 F.2d 312, 314 (3d Cir. 1985). As a precondition to the issuance of the writ, the petitioner must establish that there is no alternative remedy or other adequate means to obtain the desired relief, and the petitioner must demonstrate a clear and indisputable right to the relief sought. *Kerr v. United States District Court*,

426 U.S. 394, 403 (1976). A writ is not a substitute for an appeal; only if a direct appeal is unavailable will the court determine whether a writ of mandamus will issue. *See In Re Ford Motor Co.*, 110 F.3d 954, 957 (3d Cir. 1997). Petitioner-Appellant has exhausted available administrative and judicial tribunals to obtain the hearing before Respondent-Appellee's Disciplinary Appeals Board that she is entitled to. Petition for Writ of Mandamus appears to be the remedy that will best conserve judicial time and resources, meeting the criteria of Supreme Court Rule 20. (28 U.S.C. § 1651 (a)).

AN ORDER BY WRIT OF MANDAMUS CAN ISSUE

On the unique facts of this case where Respondent-Appellee (Respondent) U.S. Veterans Administration (VA) successfully argued and established at the Merit Systems Protection Board (MSPB) that Petitioner-Appellant (Petitioner) has the right to a hearing before VA's Disciplinary Appeals Board (DAB), and as the relief before this Court Petitioner is seeking only her DAB hearing at the VA that Respondent VA has continually denied to her contrary to principles of *judicial estoppel* and *law of the case*, an Order per Writ of Mandamus can properly issue from this Court to require Respondent VA to provide to Petitioner her VA administrative due process and hearing rights that Respondent VA successful argued to MSPB the Petitioner is entitled to as a matter of law.

SUMMARY FACTS AND PROCEEDINGS

Petitioner Saundra J. Counce, a registered nurse with no prior U.S. Government service (Petitioner), was hired by VA on June 17, 2001. The next day she

took the oath of office and began work as a "full-time temporary" under § 7405(a)(1)(A) of Chapter 74 of 38 U.S.C. (Appendix A and E, p. 5a and 25a.) Chapter 74 of Title 38 grants VA special authority to hire and pay nurses and other medical professionals without regard to the Civil Service laws in Title 5.[1] The probationary period for VA nurses, physicians and similar medical professionals is two years (38 U.S.C. § 7403(b)(1)[2]. Probation starts on the employee's "anniversary date,"[3] more technically called "Service

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[1] § 7405. Temporary full-time appointments, part-time appointments, and without-compensation appointments.

(a) The Secretary, upon the recommendation of the Under Secretary for Health, may employ, *without regard to civil service or classification laws, rules, or regulations*, personnel as follows:

(1) On a *temporary full-time* basis, part-time basis, or without compensation basis, persons in the following positions:

(A) Positions listed in section 7401 (1) of this title. (including *registered nurses*) (Emphasis added.)

[2] "Appointments described in subsection (a) [*e.g.*, physicians, nurses, physician assistants hired under Chapter 74] shall be for a probationary period of two years." Further, VA Handbook 5005, April 15, 2002, provides, in Part II, Chapter 3, b. *Length of Probationary Period*: "The probationary period for employees appointed on or after December 20, 1979, is 2 years. In addition, para. c. *Last Day of Probationary Period*, provides, in subpara. (2), that "For employees paid on an hourly basis (nurses, nurse anesthetists . . . . the probationary period is completed at the end of the last scheduled duty before the employee's **anniversary date** . . . (Emphasis added).

[3] VA HANDBOOK 5005/7 APRIL 15, 2002 PART II CHAPTER 3

SECTION F. APPOINTMENTS UNDER 38 U.S.C. 7401.

Computation Date" (SCD) or anniversary date. A VA employee's SCD appears in Block 31 of STANDARD FORM 50-B, NOTIFICATION OF PERSONNEL ACTION. (*See* Appendix E, p. 27a, block 31.) A VA employee's probationary period keeps running in her favor, so long as her performance at VA is not written up as "unsatisfactory." (*See* § 7403(b)(2).)

On April 21, 2002, after 10 months of satisfactory work, Petitioner was converted from "temporary full-time" to "permanent" VA nurse status under § 7401(1) of Chapter 74, 38 U.S.C. The Standard Form 50-B recited in "Remarks" that her conversion appointment was "Subject to completion of 2 year probationary period commencing 04-21-2002." (Appendix A and E, p. 6a and 26a.) Petitioner, who at that time knew very little about VA's personnel system, assumed VA had authority to extend her probationary period for an extra 10 months and therefore expected to be probationary through April 20, 2004.[4] Petitioner was surprised when she re-

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3. PROBATIONARY PERIOD FOR 38 U.S.C. 7401(1) APPOINTEES

b. Length of Probationary Period.

c. Last Day of Probationary Period.

(2) For employees paid on an hourly basis (nurses, nurse anesthetists, PAs (physician assistants), and EFDAs (expanded-function dental auxiliaries)()), *the probationary period is completed at the end of the last scheduled duty before the* ***employee's anniversary date***. (Emphasis added).

[4] VA and Office of Personnel Management regulations appear to be to the contrary. (*See* VA Handbook 5005/7 (fn. 3); 5 CFR 315.704 (a) (1) and (2) (temporary employment counts toward a probationary period); 5 CFR 315.802 (a) ("The probationary period required by § 315.801 is 1 year and may not be extended.").

ceived her Proficiency Report in mid-June 2002 (VA FORM 10-2623).[5] VA had entered her SCD as "6-17-01." (Appendix F, p. 28a.) From that entry it appeared her probationary period was half over. She could expect to be "permanent"—tenured—by June 2003, not April 2004, as the April 21, 2002 conversion Form 50-B recited. (Appendix A and E, p. 6a and 26a, section 45. REMARKS, lines 2-3).

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5 CFR § 315.704 Conversion to career employment from indefinite or temporary employment.

(a) *General.* Employees serving after February 7, 1968, in competitive positions under indefinite appointments or temporary appointments pending establishment of a register or as status quo employees acquire competitive status and *are entitled to have their employment converted to career employment when such employees*:

(2) Have rendered satisfactory service for the 12 months immediately preceding the conversion; and . . . . (Emphasis added) (a) The first year of service of an employee who is given a career or career-conditional appointment under this part is a probationary period . . . (Emphasis added).

5 CFR § 315.802 Length of probationary period; crediting service.

(a) The probationary period required by §315.801 is *1 year and may not be extended.* (Emphasis added.)

[5] Petitioner was rated "Satisfactory" in her June 2002 Proficiency Report. Her supervisor, Linda Wyatt, RN, commented favorably on her professional performance:

> *"Mrs. Counce is self-directed in organizing and providing skilled nursing assessments and care to patients with multivariate nursing diagnoses and psychological needs . . ."*
>
> *"Mrs. Counce has been a role model and is one of the preceptors for nurses who are new to 2 North. She is supportive of her colleagues, and encouraging of new staff. I have received several compliments regarding her tact and patience in precepting new nurses. . ."* (Appendix F, p. 28a.)

The end of May 2003, Petitioner's immediate supervisor, Linda Wyatt, RN., gave Petitioner her second annual Proficiency Report, plus a copy for her files. Wyatt asked Petitioner to review, sign, and return the Proficiency Report, keeping the copy for her personal records. Again, VA's SCD entry on that employee rating document, VA FORM 10-2623, was "6-17-01."[6] (Appendix F, p. 30a-31a.) On May 30, 2002, Petitioner signed one copy of her Proficiency Report and placed it in her supervisor's office when Wyatt was away from her desk. (Counce Affidavit: DE#21 Part 2 Appendix C.) Petitioner kept the unsigned duplicate. (*See* Appendix F, p. 30a-31a.)

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[6] Petitioner's supervisor rated her "Satisfactory" at the end of her second year, and once again made favorable comments:

> Practice: "*Mrs. Counce is an experienced nurse who continues to bring a high level of care and compassion with her to 2 North. She is respected by new nursing staff, veteran nursing staff, her patients and their families. . . . I have personally received favorable comments about Mrs. Counce from staff and from patients and their families. . . .*"
>
> Performance: "*Mrs. Counce actively self-appraises her own nursing skills, and is willing to attend educational offerings on her free time . . .*"
>
> Collegiality: "*Mrs. Counce also appraises and monitors the nursing skills and quality of care provided by other nurses on 2 North, and shares her observations with the Nurse Manager. She has been very supportive of the new nursing orientees on 2 North. Mrs. Counce also serves as a role model and resource to the nursing joint 2 North staff.*"
>
> Collaboration: "*A recent new nurse orienting to 2 North had a very difficult time in acquiring the nursing skills and self-confidence to feel secure on 2 North. Mrs. Counce heard of the problems, and asked that the new nurse be placed on her weekend rotation so that she could assist this new staff member in orienting to 2 North, at a more comfortable pace, so that we have retained this valued new nurse.*"

Petitioner never again saw the end-of-second year Proficiency Report she signed and placed in her supervisor's office on May 30, 2003.[7] Despite Petitioner's repeated requests and motions, Respondent-Appellee VA did not produce in discovery the "lost" 2002-2003 Proficiency Report Petitioner signed and turned in on May 30, 2003.

VA's next personnel action was on June 13, 2003. Petitioner was given a permanent appointment under § 7403 of Chapter 74 of 38 U.S.C. (Appendix E, p. 27a.) Effective June 15, 2003, Petitioner was classified as "permanent" per Block 24 of FORM 50-B, "Tenure." For the second time, the Block 31, SCD entry was "06-17-01.[8] This Standard Form 50-B had no qualifying remarks like the Form 50-B Petitioner received on April 21, 2002. That NOTIFICATION OF PERSONNEL ACTION stated that Petitioner

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[7] Affidavits in the record by both the union president and union steward, B.R. Hardison and Nelda Rouse, RN, affirm that on May 30, 2003, they saw and discussed the Proficiency Report that Petitioner's supervisor gave her about 10 days before, rating her second performance year (retained, unsigned copy at Appendix F, p. 30a-31a). When President Hardison saw that evaluation he exclaimed: "Sign that sucker, and get it in!" (Hardison Affidavit, p. 1, ¶ 2 (DE21Part4Page30Para2Line4), Rouse Affidavit, ¶ 13-15 (DE21Part5Page5-8.)

[8] Section 7403 (a) (1) provides:

> Appointments under this chapter of health-care professionals to whom this section applies may be made only after qualifications have been satisfactorily established in accordance with regulations prescribed by the Secretary, without regard to civil-service requirements.

Subsection (a) (2) states:

> This section applies to the following persons appointed under this chapter:
>
> . . . (E) Nurses.

was to stay on probation for two years starting April 21, 2002. (Agency's Appendix B to MSPB submission to Judge Clancy, also at Appendix E, p. 27a.)

August 1, 2003, Petitioner was given notice that her professional performance would be reviewed by a Nurse Professional Standards Board (NPSB) to be convened August 21, 2003. (Appendix G, p. 36a-38a.) The purpose of the NPSB was:

> 1 ". . . to conduct a summary review of your performance and conduct *during your probationary period* and make a recommendation concerning your retention in or separation from the Veteran's Health Administration. This review is being held pursuant to 38 U.S.C. (United States Code) section 7403 (b),[9] and will be based upon available records and information furnished by you and others who may be called by the NPSB."
>
> 2. "The NPSB is to review the following alleged *deficiencies in your performance and conduct:*"
>
> *"Falsification of medical records related to medication administration, insubordination (failure to report to duty, not training, as directed by the Nurse Manager), and failure to follow acceptable*

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[9] Section 7403 (b) provides:

> (1) Appointments described in subsection (a) shall be for a *probationary period of two years.* (Emphasis added.)
>
> (2) The record of each person serving under such an appointment in the Medical, Dental, and Nursing Services shall be reviewed from time to time by a board, appointed in accordance with regulations of the Secretary. If such a board finds that such person is not fully qualified and satisfactory, such person shall be separated from the service.

> *nursing standards of care and practice related to patient care.*" (Appendix G) (Emphasis added.)

VA's August 1st notice warned Petitioner that (because VA asserted she was still "probationary," *see* para. 1, next above) she did not have the right to full assistance of a representative or legal counsel during the hearing, or the right to examine third parties' evidence presented at the NPSB. Despite her inability to cross-examine witness testimony or to question evidence that could include damaging hearsay, such unexamined materials could be used by the NPSB to pass judgment on her performance as a nurse. The August 1st letter cautioned Petitioner about the summary nature of NPSB proceedings:

> "This is not an adversarial proceeding, so your representative's role will be limited to assisting you in exercising your right to respond orally and/or in writing to the reasons for the review."[10]

August 17, 2003, Petitioner was handed a different 2002-2003 second year Proficiency Report (VA FORM 10-2623), than the "Satisfactory" Proficiency Report she was given, had signed, and placed in her supervisor's office the prior May 30th. This substituted Proficiency Report was prepared by her same supervisor, Linda Wyatt, RN; but this time Wyatt rated Petitioner "Low Satisfactory" for the same year, "From 6-17-02 To 6-17-03". (Appendix F, p. 32a-33a.)

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[10] During the NPSB's review Petitioner's representative was not allowed to speak or ask questions even when Petitioner was testifying or being questioned; Petitioner was excluded from the hearing except when she was testifying; and no transcript was made of the proceedings. The record consists of copies of occasional handwritten notes and individual observations made by those who sat as the NPSB.

Petitioner was surprised. Counting the 2002-2003 Proficiency Report Nurse-Supervisor Wyatt gave her on May 20th that Petitioner reviewed, signed and turned in, Wyatt had rated Petitioner's professional performance "Satisfactory" for two years running. (Appendix F, p. 28a-31a.)[11] Petitioner did not sign the August 17, 2003 substituted Proficiency Report. (Appendix F, p. 29a-31a.)

Despite VA having noticed Petitioner to appear before an NPSB, a summary review board[12] with

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[11] In addition to substituting "*Low Satisfactory*" for "*Satisfactory*," Supervisor Wyatt's comments were 180 degrees (*Valentine-Johnson*, 386 F.3d at 810) from her comments on Petitioner's annual Proficiency Reports that Wyatt gave her for the prior two years. (Appendix F, p. 32a-35a.)

Under "*Practice*," *e.g.*, Wyatt stated:

> "*Mrs. Counce has difficulty in managing and delivering care in an efficient and timely manner.*"

For "*Performance*," Wyatt observed:

> "*Mrs. Counce has a chronic problem with organization and prioritization of care, and usually stays over after the shift is over to complete her documentation.*"

Under "*Collegiality*," Nurse-Supervisor Wyatt wrote:

> "*Mrs. Counce is very willing to critique the nursing care of her fellow nurses, but does not scrutinize her own nursing practice as carefully.*"

Wyatt commented on Petitioner's "*Collaboration:*"

> "*Mrs. Counce consults the team physicians when necessary, but has not developed sound interpersonal skills to deal with other health care providers. . . .*" (Emphasis added).

[12] VA HANDBOOK 5005/17 APRIL 15, 2002 PART II

CHAPTER 3 SECTION C. PROFESSIONAL STANDARDS BOARDS

jurisdiction limited to nurses who have not completed their probationary service,[13] VA's SCD entry in Block 11 of that "new" Proficiency Report—her anniversary date was for the fourth time—6-17-01." (*see* fn. 14) (Appendix F, p. 32a-33a.) On its face, that entry certified that by August 17, 2003, Petitioner had completed 26 months of creditable service and

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1. ESTABLISHMENT a. Professional Standards Boards for occupations listed in 38 U.S.C. 7401(1) act for, are responsible to, and are agencies of the Under Secretary for Health in matters concerning appointments, advancements, and probationary reviews of physicians, dentists, podiatrists, optometrists, chiropractors, nurses [RNs], ... *Boards will determine eligibility and recommend the appropriate grade for appointments under authority of 38 U.S.C. 7401(1) and 7405(a)(1) ((A))*; recommend candidates for advancements; [ ] and *conduct probationary reviews.*

[13] VA HANDBOOK 5021 APRIL 15, 2002 PART III CHAPTER 1.

PROBATIONARY PERIOD ACTIONS

TITLE 38 PROBATIONARY EMPLOYEES

1. SCOPE. This chapter contains the policy and procedures needed for taking actions against title 38 employees *serving on a probationary period* under 38 United States Code (U.S.C.) 7403(b) in the Department of Veterans Affairs (VA). *This includes employees appointed under 38 U.S.C. 7401(1)*, i.e., *nurses* (Emphasis added.)

VA's HANDBOOK 5021 also makes it abundantly clear, when delineating the hearing rights of medical professionals like registered nurses who, like Petitioner, are appointed under § 7401 (1), that such 7401 (1) appointees do not have any rights to VA's due process and fair adjudicative procedures at the DAB (including the right to be represented by counsel at all times) (CHAPTER I, PART II, 1. SCOPE, **unless and until, such § 7401 (1) nurse appointees like Petitioner ". . . *have satisfactorily completed the probationary period required by 38 U.S.C. 7403 (b).*** (at fn. 15: 1. SCOPE, a. (1)). (Emphasis added.)

therefore she had been a permanent VA nurse for 2 months.

The day of her NPSB hearing, August 21, 2003, Petitioner was handed another copy of VA's substituted 2002-2003 Proficiency Report. Petitioner's supervisors ordered her to review that Proficiency Report and sign it, to record that she received it. She refused to sign. Her supervisor, Linda Wyatt, RN, noted in Block 19a, 'Signature of Employee: "Ms. Counce refused to sign proficiency. LW (Linda Wyatt) 8-21-03." (Appendix F p. 34a-35a.)

That substituted second annual Proficiency Report evaluating Petitioner for her professional performance June 2002 through June 2003, also had Petitioner's SCD entry as "6-17-01."[14] (Appendix F, p. 7.)

Petitioner was terminated by action of the NPSB, despite her objections to denial of the due process she was entitled to as a VA nurse who had completed her two years of probationary service. As a permanent VA nurse, for "charges based on conduct or performance" (38 U.S.C. § 7461 (a)) such as Petitioner was facing, she had the due process hearing rights provided before VA's Disciplinary Appeals Board (DAB) (§ 7461 (b) (1),[15] including the right,

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[14] Counting the Standard FORM 50-B effective June 15, 2003 that appointed Petitioner a permanent VA nurse under § 7403 of Chapter 74, 38 U.S.C. (Appendix E, p. 27a), by August 21, 2003, VA had officially notified Petitioner in five documents (Appendix F, p. 28a, 30a, 32a, 34a, Block 11: SERVICE COMPUTATION DATE, and Appendix E, p. 27a, Block 24, TENURE: 1—PERMANENT).

[15] VA HANDBOOK 5021 APRIL 15, 2002 CHAPTER I.

PART II. DISCIPLINARY PROCEDURES UNDER TITLE 38, DISCIPLINARY AND MAJOR ADVERSE ACTIONS

> . . . ***to be represented by an attorney or other representative of the employee's choice at all stages of the case.*** (38 U.S.C. § 7462 (b) (2)). (Emphasis added.)

Instead, VA ordered Petitioner tried by an NPSB (Appendix G, p. 36a-38a) - August 1, 2003 Notice of the NPSB hearing), a summary review board with jurisdiction limited to probationary VA employees who had not completed a two year probationary period. (38 U.S.C. § 7403 (b) (1)).[16]

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1. SCOPE

a. This part governs disciplinary and major adverse actions based on conduct or performance in the Department of Veterans Affairs (VA).

(1) The provisions of this chapter apply to VA employees holding a full-time, permanent appointment under 38 United States Code (U.S.C.) 7401(1) who have satisfactorily completed the probationary period required by 38 U.S.C. 7403(b). Included are: . . . . (Emphasis added.)

(e) Nurses . . . .

3. POLICY . . . .

c. Employees are entitled to be represented by an attorney or other representative of the employee's choice at all stages of the case.

d. Actions covered under this part are subject to the prohibited personnel practices listed in 5 U.S.C. 2302, prohibiting:

(1) Discrimination because of race, color, religion, sex, national origin, age, disabling condition, marital status, or partisan political reasons; and

(2) Reprisal for the proper exercise of an employee's legal or administrative rights.

[16] VA HANDBOOK 5021 APRIL 15, 2002 CHAPTER I.

PART III. PROBATIONARY PERIOD ACTIONS

CHAPTER I. TITLE 38 PROBATIONARY EMPLOYEES

In spite of VA's repeated official personnel actions that by mid-June 2003 appeared to make Petitioner

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1. SCOPE. This chapter contains the policy and procedures needed for taking actions against title 38 employees serving *on* (sic) *a probationary period* under 38 United States Code (U.S.C.) 7403 (b) in the Department of Veterans Affairs (VA). This includes employees appointed under 38 U.S.C. 7401 (1), i.e., physicians, dentists, nurses. . . .

f. PROFESSIONAL STANDARDS BOARDS. Professional Standards Boards will review the work records of each employee serving a probationary period in accordance with the provisions of this chapter. . . .

3. SUMMARY BOARD REVIEWS

d. Employee Rights. Employees subject to summary Board review have the right to: . . .

(5) Be represented by an individual of the employee's choice . . . . A summary review is not an adversarial procedure. The representative's role is limited to assisting the employee in exercising the right to reply orally and/or in writing to the reasons for the review. . .

f. Conduct of Board Review . . . .

(5) A verbatim recording of the review will not be made unless the Chairperson deems it necessary. . . .

(6) The Chief, Human Resources, or designee, will serve as a technical adviser to the Board. . . .

(7) To obtain essential facts, the Chairperson may call persons before the Board to answer questions that may assist the Board in its review. This includes persons who are believed to possess pertinent information about the employee or the circumstances which led to the review. . . .

(9) Only Board members are entitled to be present when an individual is being interviewed, except that an employee's representative may be present when the employee is being interviewed, *Employees or others who may be called upon to furnish information will not be subject to cross-examination, and the Chairperson of the Board will ensure that this does not occur.* (Emphasis added)

"VA permanent" (*see* fn. 14), the September 19, 2003 termination letter is captioned: "Saundra Counce, RN-Separation During Probationary Period." Reasons alleged for her termination included Petitioner's "*failure to follow acceptable nursing standards of care and practice related to patient care.*" (Appendix B, p. 11a-13a.)

Petitioner's case proceeded to the Merit Systems Protection Board. MSPB had jurisdiction to hear her claims involving professional conduct and competence if she was a probationary VA employee (38 U.S.C. § 7403 (f)(3), but not if she was a permanent VA employee. (38 U.S.C. § 7461 (a), (b)(1), and (c)(1); § 7462 (a) (1) (A) (B). If permanent, 38 U.S.C. § 7462—titled "Major adverse actions involving professional conduct or competence," granted exclusive jurisdiction to VA's DAB:

> (a)(1) Disciplinary Appeals Boards appointed under section 7464 of this title shall have *exclusive jurisdiction to* review any case—
>
> (A) which arises out of (or which includes) a *question of professional conduct or competence* of a section 7401 (1) employee; and
>
> (B) in which a major adverse action was taken. (Emphasis added).

VA reversed position at the MSPB, successfully arguing that MSPB lacked jurisdiction because Petitioner "was a permanent employee" (Appendix A, p. 2a, ¶ 3) and consequently she had the 38 U.S.C. § 7462 hearing rights of a permanent VA employee (38 U.S.C. §§ 7461 through 7464) before the VA's Disciplinary Appeals Board (DAB). Although VA noted that in its view Petitioner had not yet satisfied

its probationary period requirements,[17] Respondent-Appellee VA expressly represented to the MSPB that because it had appointed her under 38 U.S.C. § 7401 (1), "Appellant was a permanent employee. . . ." (Appendix A, p. 2a) VA's MEMORANDUM IN SUPPORT OF MOTION FOR DISMISSAL FOR LACK OF JURISDICTION asserted:

> She is therefore subject to the exclusive remedy for major adverse actions, that is, an appeal to the VA Undersecretary for Health for the empanelment of a Disciplinary Appeals board. She has not made such an appeal. MSPB is without jurisdiction to hear this appeal of a major adverse action by a 38 U.S.C. 7401 (1) employee."[18] (Appendix A, p. 2a-3a, ¶ 3.)

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[17] As indicated throughout, the only way the VA's DAB can have "exclusive jurisdiction" over Petitioner's appeal, as Respondent VA successfully argued to the MSPB, is if she was a permanent VA nurse. Respondent could have presented the June 15, 2003 FORM 50-B to establish more easily to MSPB that Petitioner was a permanent employee so that DAB, not MSPB, had jurisdiction over her appeal. But that would have locked Respondent VA into the stance that Petitioner was "permanent." From Respondent's arguments and flip flops as to whether Petitioner was "*fish or fowl*," it appears that when Respondent argued to MSPB that Petitioner was permanent and had DAB hearing rights, it intended to reverse that position as soon as MSPB denied jurisdiction over Petitioner's appeal, as it did on May 3, 2004 and thereafter in federal court when Petitioner attempted to "*collect*" on her loss at MSPB by requesting her DAB hearing at VA.

[18] Petitioner points out that Respondent did not include in its submissions to MSPB, nor make any mention of VA's June 15, 2003 FORM 50-B that made Petitioner a VA permanent nurse pursuant to §7403 (Appendix E p. 27a), although VA has not denied it was issued. Unlike the April 21, 2002 appointment citing §7401 (1), the June 15, 2003 appointment pursuant to

Further on, VA's MEMORANDUM IN SUPPORT OF MOTION FOR DISMISSAL represented to the MSPB:

> *. . . [S]he is subject to Disciplinary Appeals Board procedure. Since a discharge is expressly defined in 38 U.S.C. 7461 (c) (2) (E) as a major adverse action, Appellant should have filed an appeal with the Disciplinary Appeals Board. She did not do so. Appellant had Title 38 remedies . . . .*" (Appendix A, p. 2a-3a.) (Emphasis added).

MSPB's administrative judge accepted Respondent-Appellee's representations that Petitioner had DAB hearing rights at the VA; that the DAB had "exclusive jurisdiction" over Petitioner's claims:

> *. . . [It] appears that appellant's removal was a major adverse action involving professional conduct as contemplated under 38 U.S.C. "§ 7462, and such an action is not reviewable by the Board . . . . Appellant alleged that she was not subject to this exclusive internal review process because she was not a permanent employee. . . .* ***The agency claimed, however, that she was subject to the Disciplinary Appeals Board (DAB) procedure.*** *(Appeal File, Tab 6). Indeed, while appellant may have been subject to completion of a probationary period, she was serving under a permanent appointment to a position listed at 38 U.S.C. § 7401 (1). Id. It therefore appears that*

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§ 7403 was unconditional. (Appendix E, p. 27a, compare the "Remarks" section with the April 21, 2002 FORM 50-B.) There was no recitation on the June 15, 2003 FORM 50-B, as there was on the April 21, 2002 FORM 50-B, that Petitioner was required to serve any probationary time beyond the two years from her SCD or anniversary date, June 17, 2001, as provided by § 7403 (b) (1).

the DAB had "exclusive jurisdiction" to review appellant's removal . . . ."

"In light of the foregoing, I find that appellant has not been subjected to a matter appealable to the Board, and that the Board lacks jurisdiction over the appeal. . . . It is therefore appropriate that the appeal be dismissed for lack of jurisdiction." (Appendix A, p. 17a-18a.) (Emphasis added.)

Yet when Petitioner appealed to VA for the DAB hearing with full due process that VA represented to the MSPB she was entitled to—a proper administrative hearing Petitioner knew she needed to properly present her claims against VA—VA changed position for the second time and denied her request for a DAB due process hearing. For DAB rights' purposes, Respondent-Appellee VA once again insisted Petitioner remained "probationary." According to VA, Petitioner had no DAB hearing rights, opposite to the position Respondent took at MSPB when it needed to have her appeal dismissed.

That surprise was in VA's response letter to Petitioner-Appellant of May 3, 2004:

Disciplinary Appeals Boards appointed under 38 U.S.C. 7464 have exclusive jurisdiction to review major adverse actions, which arise out of, or include, a question of professional conduct or competence of section 7401(1) employees who have successfully completed their probation period. Employees appointed under Section 7401(1) serve a two (2) year probationary period. You were appointed under 38 U.S.C. 7401(1) on April 21, 2002. Your two-year probation period commenced on this date. [See Appendix E, p. 26a, the April

> *21, 2002 FORM-50-B]* ***Prior service in a temporary appointment under Section 7405(A)(1) does not count towards completion of the probation period. Therefore, you had not successfully completed your probation period at the time of your discharge on October 3, 2003. Therefore, you are not entitled to appeal your discharge to a VA Disciplinary Appeals Board.*** (Appendix D)[19] (Emphasis added.)

The following December 23, 2004, the full MSPB affirmed the administrative judge's dismissal (Appendix C, p. 19a-21a), based on the VA's Motion to the MSPB. The Federal Circuit dismissed Petitioner's appeal. (Appendix C, p. 22a.)

In District Court and before the Sixth Circuit Court of Appeals, VA switched back to its original position as to Petitioner's status. Respondent contended that Petitioner's summary hearing at the NPSB afforded her all the rights she was entitled to at VA—there was no DAB jurisdiction over her claims—for the reason she never satisfied the two year probationary period VA required per the NOTIFICATION OF PERSONNEL ACTION FORM 50-B dated April 21, 2002 (Appendix A and E, p. 6a and 26a.)[20]

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[19] Again VA ignored, as Respondent-Appellee has throughout these proceedings, the NOTIFICATION OF PERSONNEL ACTION, FORM 50-B (Appendix E, p. 27a), that VA officially issued on June 15, 2003. That VA Notification of Personnel Action made Petitioner a permanent VA nurse pursuant to 38 U.S.C. § 7403. The June 15, 2003 FORM 50-B was issued without any qualification that she had to perform additional service in order to become "permanent." (*see* fn. 18).

[20] Petitioner has searched the VA's personnel manuals and so far has not been able to find any official VA regulation that allowed VA officials to extend Petitioner's statutory two-year

In a summary opinion issued November 22, 2009, the Sixth Circuit affirmed the District Court's grant of summary judgment. The opinion did not mention Petitioner's arguments or the MSPB holdings called to the Court's attention, concerning the preclusive effects of the MSPB's holdings that Petitioner had DAB hearing rights. Nor did the Sixth Circuit discuss Respondent's contradictory positions that should have estopped it from taking opposing legal positions for pure convenience. (Appendix I, p. 45a-47a.)

Petitioner filed a Motion to Clarify the first opinion by the Sixth Circuit, treated by that Court also as a petition for rehearing. (Appendix I, p. 48a-49a.)

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probationary period (§ 7403 (b) (1)) beyond June 16, 2003. Unless the probationary employee's work performance is sub-standard and those lapses are documented, employees such as Petitioner who are hired as "full-time temporary" (§ 7405 (a) (1) (A)) employees, receive probationary-time credit for such service. (*Khan v. West*, No 00-2450, 4th Cir. 2001,Unpublished, Per Curiam, Wilkinson, C.J., Motz, J., and Duffy, J., District Ct. Judge, [VA ordered to credit physician for his temporary full-time (§ 7405) service upon his conversion to VA permanent under § 7401 because § 7403 fixes probationary period at 2 years for all employees appointed under Chapter 74 of Title 38, which includes § 7405, 7401, and 7403 appointments (at p. 3-4, Appendix H, p. 39a-44a). Petitioner received a "Satisfactory" Proficiency Report for the period June 2001 through June 2002, including a number of favorable comments by her supervisor, Linda Wyatt, RN (Appendix F, p. 28a-31a) for the period—which included June 2001 through April 21, 2002—the time Petitioner worked as a full-time temporary under her § 7405 (a) (1) (A) appointment. That Proficiency Report contained all positives and no negatives. (Appendix F, p. 28a-29a, *see* fn. 5). For purposes of this Petition For Writ of Mandamus urging application of *law of the case*, it does not matter if the MSPB was right or wrong. Its holdings are the law of this case: Petitioner-Appellant does have DAB rights at the VA.

After Petitioner-Appellant filed her Motion to Clarify the Sixth Circuit's first opinion because that Court had not responded to her contentions, including that VA's NPSB had no jurisdiction to hear and determine the charges against her because by then she was "VA permanent" as held by the MSPB (*see* fn. 17), the 6th Circuit expressly affirmed the lower court's ruling that Petitioner-Appellant remained a probationary. (Appendix I, p. 45a-47a.) Despite Petitioner arguing to the Court of Appeals and presenting copy of the MSPB's holding that Petitioner was necessarily a "VA Permanent" because the VA's DAB had "exclusive jurisdiction" over her claims (*see* Pro se Plaintiff-Appellant's Dual Motion to Extend Time and Motion to Clarify, Dec. 23, 2009, p. 5, 15-17), the Court of Appeals did not mention the MSPB's holdings or Respondent-Appellee's opposite arguments made for pure convenience. The Court did respond to Petitioner's argument that VA's NPSB lacked jurisdiction:

> *In her motion, Counce [Petitioner] argues that the Nurse Professional Standards Board, which found that Counce falsified medical records and failed to follow acceptable nursing standards of care, lacked jurisdiction to review her employment performance. The record clearly indicates that Counce was still under a two-year probationary period, measured from her starting date as a permanent employee, when she was brought before the Nurse Professional Standards Board. Thus, she was subject to its jurisdiction. See 38 U.S.C. § 7403 (b) (1) and (2). (Appendix I, p. 2-3)*[21] (Appendix I, p. 49a.)

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[21] Petitioner is *not* seeking relief because the 6th Circuit was wrong on the law as to whether Petitioner-Appellant was

ARGUMENT

As a matter of law, since the point MSPB ruled Petitioner had DAB hearing rights because serving under a permanent appointment, it has been "the law of the case," that she has full due process hearing rights at the VA's DAB. As held in *University of Tennessee v. Elliott*, 478 U.S. 788, 798-799 and fn. 6 106 S.Ct. 3220, 3226 (1986), judgments rendered by administrative tribunals are binding on the parties in later stages of the same matter, where the tribunals have jurisdiction and the parties are accorded fair procedures (citing Davis, Administrative Law and Restatement of Judgments, § 83 (1982). More recently, in *State of New Hampshire v. State of Maine*, 532 U.S. 742, 747, 121 S.Ct. 1808 (2001). This Court unanimously ruled, in the context of a State-to-State settlement agreement one party was seeking to enforce, that:

> [W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him (citations omitted).

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probationary or permanent. The issue is not whether the 6th Circuit was wrong or right on that point of law. The question is if on the facts of this case, where Respondent-Appellee took opposite positions as to Petitioner's due process hearing rights including right to assistance of counsel at a hearing on the charges against her, the doctrines of *law of the case* and *judicial estoppel* require Respondent-Appellee VA to provide to Petitioner-Appellant the Disciplinary Appeals Board hearing rights that Respondent-Appellee *successfully argued* to the MSPB that she had at the VA.

> This rule, known as judicial estoppel, 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase. (citing, along with cases, 18 Moore's Federal Practice 134. 30, p. 134-62 (3rd Ed. 2000) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding"), citing 18 C. Wright , Miller and Cooper, Federal Practice and Procedure 4477, p. 782 (1981) ("absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory.")).

In *New Hampshire v. Maine*, This Court stated the general conditions for application of judicial estoppel, including the perception that ". . . [w]ithin the first [here the VA] or the second court [MSPB] was misled." (532 U.S. at 747.) This Court further observed that because judicial estoppel is an equitable doctrine,

> . . . [W]e do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts. (532 U.S. at 747.

In this case, the Circuit Court of Appeals did not speak to Petitioner's contentions that VA should have been estopped to assert she was probationary after having the MSPB dismiss her appeal based on VA's position that she had all the due process hearing rights of a permanent, non-probationary VA nurse. *Valentine-Johnson v. USAF*, 386 F.3d 800, 809-813 (2004) is a persuasive case of an Air Force civilian

employee the Air Force disadvantaged by switching positions as to her MSPB and related rights in federal court.[22]

Petitioner was born in 1949, to a mother who is 100% Mexican. She has mild but easily compensable reading dyslexia. When hired at VA, she had over 30 years of experience as a superior-rated nurse. She also had been married for over 30 (now 40) years and was principal caregiver to a Vietnam veteran, Donald A. Counce, who by then was severely disabled from Agent Orange exposure, brain trauma from mine explosions, and post-traumatic stress disorder (PTSD). Because of her experience and personally-acquired sensitivity to the special needs of the Veteran patients, she was expressly tasked by her supervisor to attempt to stop the bullying and related nurse-on-nurse violence that dulled nurses' empathy and caused them to neglect the Veterans they were charged to care for. (*See* Appendix F, p. 30a-35a.)

Petitioner has litigated Pro Se at all stages until the instant Petition, when Counsel of Record and Of Counsel are representing her Pro Bono. By the time Petitioner was terminated, her spouse was not able to work regularly and she was the sole support of her family of six that still included a child in school. Petitioner had no money or other resources to hire an

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[22] The similarities between Petitioner's case and *Valentine-Johnson* are unusually close, especially the unethical reversal of position that specially disadvantaged both pro se Petitioner, and pro se Plaintiff-Appellant Valentine-Johnson. The court held:

> In the interest of preventing the Air Force conduct from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment ... we conclude that judicial estoppel is applicable. (386 F.3d at 812.)

attorney; and no lawyer would take her case on contingency. As a nurse, who at that time was not at all familiar with legal process—and understandably baffled by VA's arcane personnel system and various official's contradictory interpretations of VA's personnel regulations—she was not able to successfully challenge VA's position that it had kept her as a "probationary" beyond the two year period established by 38 U.S.C. § 7403 (b)(1).[23]

Additionally, Respondent-Appellee VA should be estopped to deny her application for a DAB appeal, after VA conclusively asserted when she was targeted while still working at the VA, that she had no DAB rights; her exclusive remedy was through NPSB's summary procedures that had allowed her to be terminated based mostly on unchallenged, unexamined hearsay. (*See* Appendix G, p. 36a-38a and Appendix B, p. 11a-13a.) Further, VA's May 3, 2004 letter to Petitioner expressly rejected her application for a DAB appeal hearing (Appendix D, p. 23a-24a, the May 04 rejection letter) after the MSPB dismissed her claims because MSPB held she did have DAB rights. (Appendix C, p. 19a-21a.)

VA's successful arguments to MSPB, for example, were in conflict with the clear and simple words in VA Handbook 5021. Para. 1 states that for nurses and other medical staff appointed under the statutes within chapter 74 of Title 38 (*e.g.*, 7405 (A) (1), 7401 (1) and 7403, the three statutes under which Petitioner was appointed, converted and re-appointed or

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[23] The court's opinion in *Valentine-Johnson*, expressly weighed the factor that "she was" at critical times, proceeding pro se, and making her best effort to have all of her claims heard. (386 F.3d at 813.)

re-converted), nurses and other medical staff do not obtain DAB procedure rights until they have completed their two years of probation. (*See* fn. 13.) Because it was VA's official position, written on the April 21, 2002 NOTIFICATION OF PERSONNEL ACTION, FORM 50-B that Petitioner remained probationary until April 21, 2004 (Appendix A, p. 6a, Appendix E, p. 26a) in no way could VA have argued to the MSPB in good faith that Petitioner was "permanent" by Summer 2003 and consequently had any DAB due process and hearing rights.

VA was successful in its badfaith arguments, however, and the MSPB dismissed Petitioner's claims in that forum. Dismissal at the MSPB severely disadvantaged Petitioner, because MSPB was appropriate for litigating technical issues of federal personnel classification and law. VA successfully persuaded Administrative Judge Clancy (Appendix C, p. 15a-18a), and the full board of the MSPB (Appendix C, p. 19a-21a) (appeal dismissed by the Federal Circuit (Appendix C, p. 22a) to accept VA's representations, despite that Petitioner was, once again, denied the right to have her claims litigated properly. VA persuasively argued Petitioner had DAB rights (due process entitlements Petitioner had only if she had satisfied her 2 year probation period, which VA was adamant she had not, and could not have, until April 21, 2004); that as a matter of law DAB had "exclusive jurisdiction" over Petitioner's claims; consequently MSPB was required by law to dismiss all of Petitioner's claims. Employees are entitled to have a forum for their claims unless the applicable statutes clearly forbid MSPB, *e.g.*, from litigating the claims at issue. (*See Valentine-Johnson, supra*, at 812.)

Petitioner cited to the MSPB's holding in her litigation in federal court, and specifically petitioned the 6th Circuit to acknowledge the legal effect of the MSPB's ruling as definitive of her VA employee status as "permanent" with routine entitlements including DAB hearing rights. (*See* Pro se Plaintiff-Appellant's Dual Motion to Extend Time and Motion to Clarify, Dec. 23, 2009, p. 5, 15-17.)

The effects of the MSPB's ruling are, (1) Petitioner-Appellant was "permanent" because only a permanent VA employee could have the DAB procedure rights that VA successfully argued to the MSPB—and the MSPB ruled—she could avail herself of at the VA, (2) the MSPB's ruling that determined Petitioner is a "VA permanent" is the *law of the case* including on a remand to the VA to properly litigate her claims (*University of Tennessee v. Elliott, supra*, 478 U.S. 788, 798 fn. 6, 799, 106 S. Ct. 3220, 3226, 92 L. Ed. 2d 635 (1986); *New Hampshire v. Maine, supra*,), and (3) the MSPB's ruling, beyond being the law of the case, is forever fixed upon Respondent-Appellee VA because the MSPB ruling resulted from Respondent-Appellee VA's successful arguments.

CONCLUSION

Judicial estoppel demands that VA be made to live with the legal effects of its badfaith but successful arguments to the MSPB. Because of VA's switching positions and badfaith arguments that deprived Petitioner of effective hearing rights, Courts should impose judicial estoppel on Respondent in the most severe manner possible. VA must be ordered to view and treat Petitioner as a former employee who was "permanent" when terminated by a hearing board that had no subject matter jurisdiction over her.

Respondent-Appellee VA should be ordered to treat Petitioner as "VA Permanent" for all purposes including acknowledging and providing to her full Disciplinary Appeals Board due process and hearing rights.

Respectfully submitted,

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June 30, 2010

APPENDIX A

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

DOCKET NUMBER
AT-0752-04-0165-I-1

SAUNDRA J. COUNCE, RN
Appellant,

vs.

DEPARTMENT OF VETERANS AFFAIRS,
Agency.

AGENCY MOTION TO DISMISS

Comes now the Agency, Department of Veterans Affairs, and would move that the appellant's petition for appeal be dismissed as not within the jurisdiction of the Board. The Agency provides the following Memorandum in support of this motion.

MEMORANDUM IN SUPPORT OF MOTION FOR DISMISSAL FOR LACK OF JURISDICTION

The Department of Veterans Affairs, pursuant to the Board's Order of December 9, 2003, submits this Memorandum in Support of Dismissal of the above appeal for lack of jurisdiction.

1. Appellant is a 38 U.S.C. Section 7401(1) employee and all adverse employment actions based on conduct or performance are governed by 38 U.S.C. Sections 7461-7464. To be subject to the Board's jurisdiction,

appellant must be appointed to her position under 38 U.S.C. 7401(3), otherwise she does not meet the definition of an "employee" for MSPB appellate jurisdiction under 5 U.S.C. 7511(b)(10). See *Lamberson v. VA*, 80 MSPR 648, 662 (1999).

2. In spite of her arguments to the contrary, Appellant was a probationary employee at the time of her termination from VA employment. She neglects to provide the full documentation showing her job status during her brief employment at the VA. She was hired, effective June 17, 2001 to a Staff Nurse—0610, grade level 1/3, under an excepted appointment not to exceed (NTE) July 16, 2002. She was therefore a temporary full-time employee appointed under 38 USC 7405(a)(1). See Agency Exhibit 1. Prior to the expiration of her appointment, on April 21, 2002, Appellant's position was converted to an excepted appointment, permanent, full-time under 38 USC 7401(1). See Agency Exhibit 2. Therefore, on April 21, 2002, Appellant began her two year probationary period as mandated by 38 USC 7403(b)(1). When her employment was terminated, effective October 3, 2003, Appellant was still within her probationary period.

3. There is no support or authority for Appellant's contention that her status as a probationary employee in any way removes her from the category of being a 38 USC 7401(1) employee. In her quoted excerpt from 38 USC 7461(c), Appellant describes herself. She was "employed on a full-time basis under a permanent appointment". 38 USC 7461(c). Agency Exhibit 2 clearly shows in block 24 that Appellant was a permanent employee. Further, the Agency Exhibit 2 clearly shows that Appellant was "subject to completion of 2 year probationary period commencing 04-21-2002. She is therefore subject to the exclusive remedy for

major adverse actions, that is, an appeal to the VA Undersecretary for Health for the empanelment of a Disciplinary Appeals Board. She has not made such an appeal. MSPB is without jurisdiction to hear this appeal of a major adverse action by a 38 USC 7401(1) employee.

4. Appellant cites this Board to *Dick v. Department of Veterans Affairs*, 83 MSPR 464 (1999) as supporting her contention that her status as a 38 USC 7401(1) employee does not preclude MSPB IRA jurisdiction. In *Dick*, the Board reasoned that even though Appellant was a Title 38 employee, there was no Disciplinary Appeals Board jurisdiction nor was the action grievable. Without any remedy available to Appellant other than an IRA appeal to the Board, it was reasoned that in such a case Title 38 did not preclude IRA jurisdiction. Appellant here ignores the statement of the Board that "IRA jurisdiction over this appeal under the WPA of 1989 is not precluded by Title 38, because on the undisputed facts the actions complained of were not subject to the Disciplinary Appeals Board procedure." Ms. Counce's case here is very distinguishable from that recounted in *Dick* because she is subject to Disciplinary Appeals Board procedure. Since a discharge is expressly defined in 38 USC 7461(c)(2)(E) as a major adverse action, Appellant should have filed an appeal with the Disciplinary Appeals Board. She did not do so. Appellant had Title 38 remedies unlike the appellant in *Dick*.

5. It does not appear from the Appellant's petition that she has raised any matter that is within the Board's appellate jurisdiction. The appellant bears the burden of proof as to the issue of the Board's jurisdiction. 5 CFR § 1201.56(a)(2)(i). As the appellant has failed to raise any matter within the jurisdiction

of the Board, the Agency moves the Board to find that a hearing is not warranted in this case. *See Rose v. Department of Health and Human Services*, 721 F.2d 355, 357 (Fed. Cir. 1983).

WHEREFORE, the Agency moves for the dismissal of this Appeal.

Respectfully submitted this the 31st day of December, 2003.

/s/ Alan E. Foster
Alan E. Foster
Attorney for the Agency

07 26 01 MON 13:46 FAX 615 371 6330 V.A. M.C. NASHVILLE 003

COPY

Standard Form 50-B
Rev. 7/91
U.S. Office of Personnel Management
FPM Supp. 296-33, Subch. 4

NOTIFICATION OF PERSONNEL ACTION

626 626

1. Name (Last, First, Middle) — 2. Social Security Number — 3. Date of Birth — 4. Effective Date

[redacted]NCE,SAUNDRA J — 10-17-49 — 06-17-2001

FIRST ACTION — SECOND ACTION

	5A. Code	5B. Nature of Action	6A. Code	6B. Nature of Action
	171	EXCEPTED APPOINTMENT NTE 07-16-02		
	5C. Code	5D. Legal Authority	6C. Code	6D. Legal Authority
	V8V	38 U.S.C. 7405(A)(1)		
	5E. Code	5F. Legal Authority	6E. Code	6F. Legal Authority

7. FROM: Position Title and Number

16. TO: Position Title and Number
NURSE
/STAFF NURSE/
000000

8. Pay Plan	9. Occ. Code	10. Grade/Level	11. Step/Rate	12. Total Salary	13. Pay Basis
		AD 0610	I/3	.14 $42,657	PA
15A. Basic Pay	**15B. Locality Adj.**	**15C. Adj. Basic Pay**	**15D. Other Pay**	**16A. Basic Pay**	**16B. Locality Adj.**	**16C. Adj. Basic Pay**	**16D. Other Pay**
				$42,657	$0	$42,657	$0

14. Name and Location of Position's Organization

25. Name and Location of Position's Organization
VA TENNESSEE VALLEY HCS
PATIENT CARE SVCS NURSING SERVICE
NASHVILLE TN

EMPLOYEE DATA

23. Veterans Preference	24. Tenure	25. Agency Use	26. Veteran Preference to RIF
1 - None 3 - 10-Point/Disability 5 - 10-Point/Compassionate 2 - 5-Point 4 - 10-Point/Other 6 - 5-Point/Compassionate	0 1 2		YES NO X

27. FEGLI	28. Annuitant Indicator	29. Pay Rate Determinant
C BASIC LIFE ONLY	9 NOT APPLICABLE	U

30. Retirement Plan	31. Service Comp. Date (Leave)	32. Work Schedule	33. Part-Time Hours Per Biweekly Pay Period
K FERS 4	06-17-01	F FULL-TIME	
4 FICA			

POSITION DATA

34. Position Occupied	35. FLSA Category	36. Appropriation Code	37. Bargaining Unit Status
2 1 - Competitive Service 3 - SES General 2 - Excepted Service 4 - SES Career Reserved	E E - Exempt N - Nonexempt	6241-213C	7777

38. Duty Station Code	39. Duty Station (City - County - State or Overseas Location)
47-17060-037	NASHVILLE TN

40. AGENCY DATA	41.	42.	43.	44.

45. Remarks
ASSIGNMENT: STAFF NURSE

APPOINTMENT AFFIDAVIT EXECUTED 06-18-2001.

EMPLOYEE IS AUTOMATICALLY COVERED UNDER FERS

FROZEN SERVICE: NONE.

CREDITABLE MILITARY SERVICE: NONE.

PREVIOUS RETIREMENT COVERAGE: NEVER COVERED.

EMPLOYEE HAS ADDITIONAL QUALIFICATIONS OR MORE COMPLEX ASSIGNMENT

EXHIBIT A

46. Employing Department or Agency
DEPARTMENT OF VETERANS AFFAIRS

47. Agency Code: VA TA | 48. Personnel Office ID: 1-66 | 49. Approval Date: 06-17-2001

50. Signature/Authorization and Title of Approving Official
[redacted]
HUMAN RESOURCES OFFICER

Case 3:06-cv-00771 Document 15 Filed 05/08/2006 Page 1 of 1

5a

BEST AVAILABLE COPY

U.S. Office of Personnel Management
FPM Supp. 296-33, Subch. 4

NOTIFICATION OF PERSONNEL ACTION

COPY

626 626

1. Name (Last, First, Middle)	2. Social Security Number	3. Date of Birth	4. Effective Date
COUNCE, SAUNDRA J		10-17-49	04-21-2002

FIRST ACTION

5A. Code	5B. Nature of Action
570	CONV TO EXCEPTED APPOINTMENT
5C. Code	**5D. Legal Authority**
V8V	38 U.S.C. 7401(1)
5E. Code	5F. Legal Authority

SECOND ACTION

6A. Code	6B. Nature of Action
6C. Code	6D. Legal Authority
6E. Code	6F. Legal Authority

7. FROM: Position Title and Number	8. Pay Plan	9. Occ. Code	10. Grade And Step	11. Total Salary	12. Pay Basis
NURSE /STAFF NURSE/ 000000	AD	0610	I/3	$44,972	PA

13. Basic Pay	14. Locality Adj.	15. Adj. Basic Pay	16. Other Pay
$44,972	$0	$44,972	$0

17. Name and Location of Position's Organization
VA TENNESSEE VALLEY HCS PATIENT CARE SVCS NURSING SERVICE NASHVILLE TN

18. TO: Position Title and Number	19. Pay Plan	20. Occ. Code	21. Grade And Step	22. Total Salary	23. Pay Basis
NURSE /STAFF NURSE/ 000000	VN	0610	I/3	$44,972	PA

24. Basic Pay	25. Locality Adj.	26. Adj. Basic Pay	27. Other Pay
$44,972	$0	$44,972	$0

28. Name and Location of Position's Organization
VA TENNESSEE VALLEY HCS PATIENT CARE SVCS NURSING SERVICE NASHVILLE TN

EMPLOYEE DATA

29. Veterans Preference	30. Tenure	31. Agency Use	32. Veterans Preference for RIF
1	1		YES NO X

33. FEGLI	34. Annuitant Indicator	35. Pay Rate Determinant
BASIC LIFE ONLY	9 NOT APPLICABLE	0

36. Retirement Plan	37. Service Comp. Date (Leave)	38. Work Schedule	39. Part-Time Hours Per Biweekly Pay Period
K FICA	06-17-01	F FULL-TIME	

POSITION DATA

40. Position Occupied	41. FLSA Category	42. Appropriation Code	43. Bargaining Unit Status
2	E	8241-213C	7777

44. Duty Station Code	45. Duty Station (City - County - State or Overseas) Location
47-1780-037	NASHVILLE TN

46. AGENCY DATA	47.	48.	49.	50.

51. Remarks

ASSIGNMENT: STAFF NURSE

SUBJECT TO COMPLETION OF 2 YEAR PROBATIONARY PERIOD COMMENCING 04-21-2002.

EMPLOYEE HAS ADDITIONAL QUALIFICATIONS OR MORE COMPLEX ASSIGNMENT.

EXHIBIT B

52. Employing Department or Agency	53. Signature/Authentication and Title of Approving Official
DEPARTMENT OF VETERANS AFFAIRS	
54. Agency Code: VA TA	55. Personnel Office ID: 566
56. Approval Date: 06-17-02	

5 Part 56-316

1 - OPF Copy - Long-Term Record — DO NOT DESTROY

Editions Prior to 2/91 Are Not Usable After 6/30/93
NSN 7540-01-333-8239

MERIT SYSTEMS PROTECTION BOARD

DOCKET NUMBER
AT-0752-04-0165-I-1

SAUNDRA. J. COUNCE, RN

Appellant,

v.

U.S. DEPARTMENT OF VETERANS AFFAIRS

Agency.

AGENCY'S RESPONSE TO PETITION FOR REVIEW

Alan E. Foster
Staff Attorney
VA Office of Regional Counsel
3322 West End Avenue
Nashville, TN 37203
615-695-4624
615-695-4634 (facsimile)
Attorney for Agency

AGENCY RESPONSE

Pursuant to 5 CFR 1201.114(d), the Agency would hereby make the following as its Response to the Appellant's Petition for Review, received in the Agency's Office of Regional Counsel on April 15, 2004. In essence, the Response to Appellant's Petition for Review is that the contents of the Petition do not comport with the requirements of 5 CFR 1201.115(a). Appellant has not addressed any of the Initial Decision's findings that she was appointed pursuant to 38 USC 7401(1) thus having no right of appeal to the Board from an adverse action, that she did not properly raise a claim of whistleblowing reprisal with the OSC, and that the removal was a major adverse action involving professional conduct and is not reviewable by the Board as an IRA appeal. The Agency would thereby ask the Initial Decision be upheld and the Petition dismissed.

STATEMENT OF THE CASE

Appellant, as a Registered Nurse, was appointed to her position under the provisions of 38 U.S.C. Section 7401(1) and all adverse employment actions based on conduct or performance are governed by 38 U.S.C Sections 7461-7464. To be subject to the Board's jurisdiction, appellant must be appointed to her position under 38 U.S.C. 7401(3), otherwise she does not meet the definition of an "employee" for MSPB appellate jurisdiction under 5 U.S.C. 7511(b)(10). *See Lamberson v. VA*, 80 MSPR 648, 662 (1999); *Pinchon v. VA*, 242 F. 3d 1367, 1371 (Fed. Cir. 2001)

In spite of her arguments to the contrary, Appellant was a probationary employee at the time of her termination from VA employment. She neglects to provide the full documentation showing her job

status during her brief employment at the VA. She was hired, effective June 17, 2001 to a Staff Nurse—0610, grade level 1/3, under an excepted appointment not to exceed (NTE) July 16, 2002. She was therefore a temporary full-time employee appointed under 38 USC 7405(a)(1). See Agency Exhibit 1. On April 21, 2002, prior to the expiration of her appointment, Appellant's position was converted to an excepted appointment, permanent, full-time under 38 USC 7401(1). See Agency Exhibit 2. Therefore, on April 21, 2002, Appellant began her two year probationary period as mandated by 38 USC 7403(b)(1). When her employment was terminated, effective October 3, 2003, Appellant was still within her probationary period.

The Initial Decision correctly points out that Appellant has "not properly sought corrective action from OSC regarding her removal, a fundamental prerequisite for establishing Board jurisdiction over an IRA appeal." Initial Decision, at p. 2. Appellant does not address the finding of the Administrative Judge that the action she sought from OSC only concerned her performance review and not her removal. Appellant also never addressed in her Petition for Review the judge's finding that the removal was a major adverse action involving professional conduct and would not be reviewable by the Board.

RESPONSE TO APPELLANT'S ARGUMENT

Appellant's cover letter to the Board, which actually appears to address this petition to the VA Disciplinary Appeals Board, does address any of the rulings made by administrative judge in his Initial Decision. Instead, Appellant has rehashed the facts as she sees them, which led to her removal. She does not address the jurisdictional issues leading to the decision to dismiss this appeal due to the lack of jurisdiction of

the Board. The Agency will not address the factual issues discussed by Appellant in her cover letter since those issues did not snake up any part of the administrative judge's Initial Decision.

CONCLUSION

There has been no allegation in the Petition for Review that the administrative judge made an error in interpreting a law or regulation. There has also been no presentation of any significant new evidence not available for earlier consideration. This Petition should be denied and the Initial Decision of the administrative judge made Final.

Respectfully submitted,

/s/ Alan L Foster
Alan L Foster
Staff Attorney
VA Office of Regional Counsel
3322 West End Avenue, Suite 509
Nashville, TN 37203
615-695-4624
615-695-4634 (facsimile)

Attorney for Agency

APPENDIX B

DEPARTMENT OF VETERANS AFFAIRS
Tennessee Valley Healthcare System
Nashville Campus
1310-24th Avenue South
Nashville TN 37212-2637

[Seal]

September 19, 2003

In Reply Refer To: 626105

VA Tennessee Valley Healthcare System
Nashville Campus
Nelda Rouse, Executive Vice-President
AFGE Local 2400
1310-24th Avenue South
Nashville, TN 37212-2637

Subject: Saundra Counce, RN - Separation During Probationary Period

Dear Ms. Rouse:

This is official notice that Saundra Counce, RN, will be separated from employment as a Staff Nurse with the Tennessee Valley Healthcare System effective October 3, 2003. On April 21, 2002, her Temporary Excepted Appointment under the authority of 38 USC 7405(a)(1) vas converted to an Excepted Appointment as a Staff Nurse under the authority of 38 USC 7401(1). Appointments under this authority are subject to the satisfactory completion of a two year probationary period. The probationary period is an extension of the appointment process during which the supervisor observes the employee's conduct and performance on the job. If concerns are raised to indicate an employee has not demonstrated fitness or

qualifications for continued employment, a Summary Review Board may be convened to review the employee's services.

A Professional Standards Board (Board) was convened to conduct a summary review to obtain the available facts and determine whether Ms. Counce was fully qualified and satisfactory based on allegations of falsification of medical records related to medication administration, insubordination, and failure to follow acceptable nursing standards of care and practice related to patient care. After a full and thorough investigation the Board determined Ms. Counce did falsify medication administration records in that she documented she had administered medications when she had not. She was found to have been insubordinate to her supervisor when she failed to report for duty as scheduled and directed by her supervisor. Furthermore, the Board found Ms. Counce failed to provide an acceptable level of patient care by not following acceptable nursing standards of care and practice related to patient care when she left a patient naked in bed, Lily exposed with the room door open, and lying in feces.

Based on these findings the Board recommended Ms. Counce be separated from employment during the probationary period. In conducting my review of the record I found no justification to disagree with or mitigate the Board's recommendation. Ms. Counce's conduct and displayed lack of professionalism are not in meeting the standards of care expected to be provided to our veteran patients. Therefore, I approved the Board Action and have made the decision to remove you from employment.

Ms. Counce may file a discrimination complaint through the Department of Veterans Affairs (DVA)

by contacting an EEO Counselor at the DVA, Office of Resolution Management (ORM/08), 3400 Lebanon Pike, Room A305, Murfreesboro, TN, 37129, or at (615) 867-6048, within 45 calendar days after the effective date of your separation. She may also contact Patricia S. Brown, EEO Discrimination Complaints Liaison Officer, at (615) 327-4751, extension 5302.

It will be necessary for Ms. Counce to contact Nursing Service to obtain clearance papers in order to properly clear this station of any indebtedness and return any government property in her possession, such as ID/Parking Cards, keys, uniforms, etc. prior to issuance of her final salary and/or lump sum payment for any accumulated annual leave. This must be done prior to her clearing station by 4:00 PM on October 3,2003. Ms. Counce will receive a Bill of Collection for any indebtedness she has incurred that is not properly cleared.

Ms. Counce will be carried in an active duty status pending the effective date of her separation.

If you or Ms. Counce have questions regarding this decision. you may contact Dr. James L. Harris, Associate Director for Patient Services, at extension 5393. For information regarding procedural matters, you may contact Mr. Lee S. Danielson, Employee/Labor Relations Specialist, Nashville Campus, Room 1-D1 12, or at extension 6371.

/s/ David N. Pennington
David N. Pennington, FACHE
Director

cc: S. Counce (118N)
Nurse Executive (118)
HR Officer (05)

APPENDIX C

[Logo] UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ATTESTATION

I HEREBY ATTEST that the attached documents identified as MSPB's Initial Decision dated March 2, 2004; MSPB's Final Order dated December 23, 2004; United States Court of Appeals for the Federal Circuit's Mandate dated May 16, 2005; Agency's Response to the Appellant' s Petition for Review dated May 3, 2004; and Agency' s Motion to Dismiss dated January 2, 2004, represent true and complete copies of the original documents of the Merit Systems Protection Board in the appeals of *Saundra J. Counce v. Department of Veterans Affairs*, Docket Numbers AT-0752-04-0165-I-1 and AT-0752-04-0165-L-1, and that the administrative records are under my official custody and control on this date.

[Seal]

on file in this board

June 24, 2010
Date

/s/ [Illegible]
for William D. Spencer
Clerk of the Board

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

DOCKET NUMBER
AT-0752-04-0165-1-1

SAUNDRA J. COUNCE,
Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Agency.

Saundra J. Counce, Nashville, Tennessee, pro se.

Alan Foster, Esquire, Nashville, Tennessee,
for the agency.

DATE: March 2, 2004

BEFORE
Joseph E. Clancy
Administrative Judge

INITIAL DECISION

Appellant filed an appeal postmarked November 27, 2003 from the agency's action removing her from the position of Staff Nurse, AD-610-I, effective October 3, 2003. For the reasons set forth below, the appeal is DISMISSED.

The record reflects that appellant was hired under a temporary appointment to the position of Staff Nurse, effective June 17, 2001, pursuant to 38 U.S.C. §7405(a)(1). On April 21, 2002, appellant was converted to a permanent appointment pursuant to 38 U.S.C. §7401(1), subject to her successful completion of a two-year probationary period. In August of 2003, appellant was advised that her performance and conduct were being reviewed, and that her alleged falsification of medication records and inadequate patient care, *inter alia*, would be examined. By letter dated September 23, 2003, appellant was informed that she would be separated from service on October 3, 2003, based upon her unacceptable conduct and performance.

Individuals serving under an appointment pursuant to 38 U.S.C. §7401(1), as was appellant, are excluded from coverage under subchapter H of 5 U.S.C. Chapter. 75, and have no right of appeal to the Board from an adverse action. *See* 5 U.S.C. §7511(b)(10); 38 U.S.C. §7425(a)(8); *Pichon v. Department of Veterans Affairs*, 67 M.S.P.R. 325, 327 (1995). Appellant acknowledged this fact, but asserted that the Board has jurisdiction over her removal as an Individual Right of Action (IRA) appeal, claiming that the action was in reprisal for her having engaged in whistleblowing activity. (Appeal File, Tabs 4 & 7). In this regard, Board jurisdiction over an IRA appeal attaches when remedies before the Office of Special Counsel (OSC) have been exhausted, and an individual sets forth non-frivolous allegations that she engaged in whistleblowing activity, and that said activity was a contributing factor in an agency's decision to take or fail to take a covered personnel action. *See Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001).

As previously noted, appellant's removal is not "otherwise appealable" to the Board under any law, rule or regulation. *See* 5 C.F.R. §1209.2(b)(2). The matter may well constitute a personnel action under 5 U.S.C. §2302(a)(2XA), and could therefore form the basis for an IRA appeal if the above-noted criteria had been met. Appellant's submissions, however, reflect that she has not properly sought corrective action from OSC regarding her removal, a fundamental prerequisite for establishing Board jurisdiction over an IRA appeal.[1] *See Rusin v. Department of the Treasury*, 92 M.S.P.R. 298, 302 (2002). In addition, appellant's alleged protected activity, *i.e.*, her "anti-bullying" campaign, did not appear to constitute whistleblowing under 5 U.S.C. §2302(b)(8). (Appeal File, Tab 4).

Moreover, it appears that appellant's removal was a major adverse action involving professional conduct as contemplated under 38 U.S.C. §7462, and such an action is not reviewable by the Board as an IRA appeal. *See Dick v. Department of Veterans Affairs*, 83 M.S.P.R. 464, 466-467 (1999); *Cochran v. Department of Veterans Affairs*, 67 M.S.P.R. 167, 173 (1995). Appellant alleged that she was not subject to this exclusive internal review process because she was not a permanent employee, citing 38 U.S.C. §7461(c). (Appeal File, Tab 7). The agency claimed, however,

---

[1] Although appellant sought corrective action from OSC in August of 2003 concerning her performance review, OSC closed that matter prior to her removal. More importantly, appellant's submissions reflect that she did not raise a claim of whistleblowing reprisal with OSC as contemplated under 5 U.S.C. §2302(b)(8). She did allege another prohibited personnel practice, *i.e.*, a violation of 5 U.S.C. §2302(b)(12), but such a claim cannot serve as the basis for an IRA appeal. (Appeal File, Tab 4, Exhibit E).

that she was subject to the Disciplinary Appeals Board (DAB) procedure. (Appeal File, Tab 6). Indeed, while appellant may have been subject to completion of a probationary period, she was serving under a permanent appointment to a position listed at 38 U.S.C. §7401(1). *Id.* It therefore appears that the DAB had "exclusive jurisdiction" to review appellant's removal, and that she is not eligible to file an IRA appeal in any event. *See Dick*, *supra*.

In light of the foregoing, I find that appellant has not been subjected to a matter appealable to the Board, and that the Board lacks jurisdiction over the appeal. *See* 5 U.S.C. §7701(a); 5 C.F.R. §1201.56(a)(2)(i); *Khan v. United States*, 201 F.3d 1375, 1381 (Fed. Cir. 2000). It is therefore appropriate that the appeal be dismissed for lack of Board jurisdiction. In light of this determination, I will make no findings regarding the timeliness of the appeal.[2]

DECISION

The appeal is DISMISSED.

FOR THE BOARD: /s/ Joseph E. Clancy
Joseph E. Clancy
Administrative Judge

---

[2] As jurisdiction has not been established in this case, appellant's request to certify the matter as a class action is denied.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOCKET NUMBER
AT-0752-04-0165-1-1

SAUNDRA J. COUNCE,
Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,
Agency.

Saundra J. Counce, Nashville, Tennessee, pro se.

Alan Foster, Esquire, Nashville, Tennessee,
for the agency.

Dec 23, 2004

BEFORE.

Neil A. G. McPhie, Chairman
Susanne T. Marshall, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703

(5 U.S.C. § 7703). You may read this law as well as review the Board's regulations and other related material at our web site, http://www.mspb.gov.

FOR THE BOARD: /s/ [Illegible]
for Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Filed May 16 2005

ORDER

The petitioner having failed to file the required Statement Concerning Discrimination, it is

ORDERED that the petition for review be, and the same hereby is, DISMISSED, for failure to prosecute in accordance with the rules.

FOR THE COURT,

/s/ Jan Horbaly
Jan Horbaly
Clerk

05/16/05

cc: Clerk's Office, MSPB
SAUNDRA J. COUNCE
CLAUDIA BURKE

ISSUED AS A MANDATE: 05/16/05

COUNCE V VA, 05-3128
MSPB - AT0752040165-I-1

APPENDIX D

DEPARTMENT OF VETERANS AFFAIRS
OFFICE OF HUMAN RESOURCES MANAGEMENT
WASHINGTON DC 20420

[Seal]

May 3, 2004

Saundra Counce, RN
276 White Bridge Road, Apt. 36
Nashville, TN 37209

Dear Ms. Counce:

Your appeal package, undated, has been received and reviewed by this office. This is to advise you are not entitled to appeal your termination during probationary period to a VA Disciplinary Appeals Board.

Disciplinary Appeals Boards appointed under 38 USG 7464 have exclusive jurisdiction to review major adverse actions, which arise out of, or include, a question of professional conduct or competence of section 7401(1) employees who have successfully completed their probation period. Employees appointed under Section 7401(1) must serve a two (2) year probationary period. You were appointed under 38 USG 7401(1) on April 21, 2002. Your two-year probation period commenced on this date. Prior service in a temporary appointment under Section 7405(A){1) does not count towards completion of the probation period. Therefore, you had not successfully completed your probation period at the time of your discharge on October 3, 2003. Therefore, you are not

entitled to appeal your discharge to a VA Disciplinary Appeals Board.

Sincerely yours,

/s/ Catherine J. Baranek
Catherine J. Baranek
Employee Relations Specialist
Office of Human Resources Management

cc: Director
Tennessee Valley Healthcare System
Nashville Campus
1310-246 Avenue South
Nashville, TN 37212-2637

07 26 01 MON 13:46 FAX 615 391 6380 V.A. M.C. NASHVILLE 003

COPY

Standard Form 50-B
Rev. 7/91
U.S. Office of Personnel Management
FPM Supp. 296-33, Subch. 4

NOTIFICATION OF PERSONNEL ACTION

426 426

1. Name (Last, First, Middle)	2. Social Security Number	3. Date of Birth	4. Effective Date
CLINCE,SAUNDRA J		10-17-49	06-17-2001

1ST ACTION — **SECOND ACTION**

5A. Code	5B. Nature of Action	6A. Code	6B. Nature of Action
171	EXCEPTED APPOINTMENT NTE 07-16-02		
5C. Code	**5D. Legal Authority**	**6C. Code**	**6D. Legal Authority**
V8V	38 U.S.C. 7405(A)(1)		
5E. Code	**5F. Legal Authority**	**6E. Code**	**6F. Legal Authority**

7. FROM: Position Title and Number	15. TO: Position Title and Number
	NURSE /STAFF NURSE/ 000000

8. Pay Plan	9. Occ. Code	10. Grade/Level	11. Step/Rate	12. Total Salary	13. Pay Basis
		AD 0610	I/3	14 $42,637	PA
16A. Basic Pay	**16B. Locality Adj.**	**16C. Adj. Basic Pay**	**16D. Other Pay**	**17A. Basic Pay**	**17B. Locality Adj.**	**17C. Adj. Basic Pay**	**17D. Other Pay**
				$42,637	$0	$42,637	$0

14. Name and Location of Position's Organization	18. Name and Location of Position's Organization
	VA TENNESSEE VALLEY HCS PATIENT CARE SVCS NURSING SERVICE NASHVILLE TN

EMPLOYEE DATA

23. Veterans Preference	24. Tenure	25. Agency Use	26. Veterans Preference for RIF
	U		YES X NO
27.	**28. Annuitant Indicator**		**29. Pay Rate Determinant**
GLI BASIC LIFE ONLY	V NOT APPLICABLE		
30. Retirement Plan	**31. Service Comp. Date (Leave)**	**32. Work Schedule**	**33. Part-Time Hours Per Biweekly Pay Period**
K FERS & FICA	06-17-01	F FULL-TIME	

POSITION DATA

34. Position Occupied	35. FLSA Category	36. Appropriation Code	37. Bargaining Unit Status
2 1 - Competitive Service 3 - SES General 4 - Excepted Service	E 1 - Exempt 2 - Nonexempt	8241.2130	7777
38. Duty Station Code	**39. Duty Station (City - County - State or Overseas Location)**		
47-1760-037	NASHVILLE TN		

40. AGENCY DATA	41.	42.	43.

45. Remarks

ASSIGNMENT: STAFF NURSE

APPOINTMENT AFFIDAVIT EXECUTED 06-18-2001.

EMPLOYEE IS AUTOMATICALLY COVERED UNDER FERS

FROZEN SERVICE: NONE.

CREDITABLE MILITARY SERVICE: NONE.

PREVIOUS RETIREMENT COVERAGE: NEVER COVERED.

EMPLOYEE HAS ADDITIONAL QUALIFICATIONS OR MORE COMPLEX ASSIGNMENT

EXHIBIT A

46. Employing Department or Agency	50. Signature/Authorization and Title of Approving Official
DEPARTMENT OF VETERANS AFFAIRS	
47. Agency Code	**48. Personnel Office ID**	**49. Approval Date**	
VA TA	1466	06-17-2001	HUMAN RESOURCES OFFICER

Case 3:06-cv-00471 Document 15 Filed 05/05/2006 Page 1 of 1

APPENDIX E 25a

07-26-04 MON 13:44 FAX 615 321 0330 V.A. M.C. NASHVILLE 0010

COPY

626 626

U.S. Office of Personnel Management
FPM Supp. 296-33, Subch. 1

NOTIFICATION OF PERSONNEL ACTION

1. Name (Last, First, Middle)
COUNCE, SAUNDRA J

2. Social Security Number

3. Date of Birth
10-17-49

4. Effective Date
04-21-2002

FIRST ACTION

5A. Code 5B. Nature of Action
570 CONV TO EXCEPTED APPOINTMENT

5C. Code 5D. Legal Authority
VAY 38 U.S.C. 7401(1)

5E. Code 5F. Legal Authority

SECOND ACTION

6A. Code 6B. Nature of Action

6C. Code 6D. Legal Authority

6E. Code 6F. Legal Authority

7. FROM: Position Title and Number
NURSE
/STAFF NURSE/
000000

8. Pay Plan 9. Occ. Code 10. Grade and Step 11. Pay Rate
AD 0610 I/3 14 $44,972 PA

12. Basic Pay 13. Locality Adj. 14. Adj. Basic Pay 15. Other Pay
$44,972 $0 $44,972 $0

16. Name and Location of Position's Organization
VA TENNESSEE VALLEY HCS
PATIENT CARE SVCS NURSING SERVICE
NASHVILLE TN

17. TO: Position Title and Number
NURSE
/STAFF NURSE/
000000

18. Pay Plan 19. Occ. Code 20. Grade and Step 21. Location 22. Pay Authorized 23. Pay Rate
VN 0610 I/3 14 $44,972 PA

24. Basic Pay 25. Locality Pay 26. Adj. Basic Pay 27. Other Pay
$44,972 $0 $44,972 $0

28. Name and Location of Position's Organization
VA TENNESSEE VALLEY HCS
PATIENT CARE SVCS NURSING SERVICE
NASHVILLE TN

EMPLOYEE DATA

29. Veterans Preference
1 1 - None 3 - 5-Point Disability 5 - 10-Point Other
2 - 5-Point 4 - 10-Point Compensable/30% 6 - 10-Point Compensable/10%

30. Tenure
1 0 - None 2 - Permanent 3 - Conditional

31. Agency Use

32. Veterans Preference for RIF
1 YES 2 NO

33. FEGLI
BASIC LIFE ONLY

34. Annuitant Indicator
9 NOT APPLICABLE

35. Pay Rate Determinant
0

36. Retirement Plan
K FERS & FICA

37. Service Comp. Date (Leave)
06-17-01

38. Work Schedule
F FULL-TIME

39. Part-Time Hours Per Biweekly Pay Period

POSITION DATA

40. Position Occupied
2 1 - Competitive Service 3 - SES General
2 - Excepted Service 4 - SES Career Reserved

41. FLSA Category
E E - Exempt
N - Nonexempt

42. Appropriation Code
8241-213C

43. Bargaining Unit Status
7777

44. Duty Station Code
47-1780-037

45. Duty Station (City - County - State or Overseas Location)
NASHVILLE TN

46. AGENCY DATA 47 48 49

50. Remarks
ASSIGNMENT: STAFF NURSE

SUBJECT TO COMPLETION OF 2 YEAR PROBATIONARY PERIOD COMMENCING
04-21-2002.

EMPLOYEE HAS ADDITIONAL QUALIFICATIONS OR MORE COMPLEX ASSIGNMENT

EXHIBIT B

51. Agency Classification Authority

52. Employing Department or Agency
DEPARTMENT OF VETERANS AFFAIRS

53. Agency Code 54. Personnel Office ID 55. Approval Date
VA TA

56. Signature/Authentication and Title of Approving Official
WM Councel

Case 3:06-cv-00177 Document 15 Filed 05/08/2006 Page 1 of 1

SF-50 (Rev. 12-1-88)

Previous Edition Is Not Usable

1 - OPF Copy 2 - Long-Term Record — DO NOT DESTROY

FPM 296-33-1, Subch. 1

Standard Form 50-B
Rev. 7-91
U.S. Office of Personnel Management
FPM Supp. 296-33, Subch. 4

NOTIFICATION OF PERSONNEL ACTION

626 626

1. Name (Last, First, Middle)	2. Social Security Number	3. Date of Birth	4. Effective Date
LOURCE, SAUNDRA J		10-17-49	06-15-2003

FIRST ACTION

5A. Code	5B. Nature of Action
893	WITHIN-GRADE INCREASE
5C. Code	5D. Legal Authority
V6V	38 U.S.C. 7403
5E. Code	5F. Legal Authority

SECOND ACTION

6A. Code	6B. Nature of Action
6C. Code	6D. Legal Authority
6E. Code	6F. Legal Authority

7. FROM: Position Title and Number	15. TO: Position Title and Number
NURSE /STAFF NURSE/ 000000	NURSE /STAFF NURSE/ 000000

8. Pay Plan	9. Occ. Code	10. Grade/Level	11. Step/Rate	12. Total Salary	13. Pay Basis
VN	0610	I/3	14	$46,818	PA
16. Basic Pay	17. Locality Adj.	18. Adj. Basic Pay	19. Other Pay		
$46,818	$0	$46,818	$0		

16. Pay Plan	17. Occ. Code	18. Grade/Level	19. Step/Rate	20. Total Salary	21. Pay Basis
VN	0610	I/3	15	$47,628	PA
22. Basic Pay	23. Locality Adj.	24. Adj. Basic Pay	25. Other Pay		
$47,628	$0	$47,628	$0		

14. Name and Location of Position's Organization

VA TENNESSEE VALLEY HCS
PATIENT CARE SVCS NURSING SERVICE
NASHVILLE TN

22. Name and Location of Position's Organization

VA TENNESSEE VALLEY HCS
PATIENT CARE SVCS NURSING SERVICE
NASHVILLE TN

EMPLOYEE DATA

23. Veterans Preference	24. Tenure	25. Agency Use	26. Veterans Preference for RIF
1	1		YES X NO

27. FEGLI	28. Annuitant Indicator	29. Pay Rate Determinant
C0 BASIC LIFE ONLY	9 NOT APPLICABLE	0

30. Retirement Plan	31. Service Comp. Date (Leave)	32. Work Schedule	33. Part-Time Hours Per Biweekly Pay Period
K FERS K	06-17-01	F FULL-TIME	

POSITION DATA

34. Position Occupied	35. FLSA Category	36. Appropriation Code	37. Bargaining Unit Status
2	E	8241.2130	0066

38. Duty Station Code	39. Duty Station (City - County - State or Overseas Location)
47-1760-037	NASHVILLE TN

40. AGENCY DATA	41.	42.	43.	44.

45. Remarks

ASSIGNMENT: STAFF NURSE

PERIODIC STEP INCREASE.

EMPLOYEE HAS ADDITIONAL QUALIFICATIONS OR MORE COMPLEX ASSIGNMENT

46. Employing Department or Agency	50. Signature/Authentication and Title of Approving Official
DEPARTMENT OF VETERANS AFFAIRS	[signature]
47. Agency Code: VA TA	48. Personnel Office ID: 1466
49. Approval Date: 06-13-2003	HUMAN RESOURCES OFFICER

TURN OVER FOR IMPORTANT INFORMATION

5 Part - SF 50

1 - Employee Copy - Keep for Future Reference

Editions Prior to 7/91 Are Not Usable After 6/30/93
NSN 7540-01-333-8238

Veterans Administration

PROFICIENCY REPORT

SECTION A — INDIVIDUAL IDENTIFICATION

1. NAME (Last, First, Middle)	2. SOCIAL SECURITY NUMBER	3. NAME AND LOCATION OF FACILITY	4. FACILITY NO.
Counce, Saundra J		VA TN Healthcare System - Nashville Campus	626

5. GRADE	6. POSITION TITLE	7. PROBATIONARY REVIEW		8. PERIOD COVERED BY REPORT	
		NEW	PRIOR EVAL	FROM	TO
Nurse I/level 3	NURSE			2001	2002

9. SERVICE	10. DATE OF BIRTH	11. SERVICE COMPUTATION DATE
Nursing Service -		6/17/01

SECTION B — NARRATIVE EVALUATION BY RATING OFFICIAL

INSTRUCTIONS: Enter below the entries under the criteria stated in the VA Nurse Qualification Standards and appropriate for clinical specialties, other significant professional contributions, and areas needing improvement. (The narrative evaluation should be limited to the space provided except in unusual circumstances.)

ASSESSMENT:

Mrs. Counce is self-directed in organizing and providing skilled nursing assessment and care to patients with multivariate nursing diagnoses and psychosocial needs. During AM assessment of a patient scheduled for open heart surgery, she noticed his escalating alarm and anxiety. She then reassured the pt, and enlisted additional assistance from the medical care team and the Nurse Manager. In a calm and supportive manner, she stayed with the pt, and was instrumental in resolving the conflict. Eventually, the pt revealed that he was fearful of his violent wife, and that he did not want her involved in his care. Mrs. Counce averted a crisis situation by remaining calmly supportive, and following through with the data she had collected during nursing assessment of this troubled patient. This incident was thoroughly reported to appropriate health care providers,and documented by Mrs. Counce. This event demonstrates the nursing process that is a clear part of her nursing care and planning. Mrs. Counce routinely provides this high standard of healthcare to her patients, and their families; and is also a trusted and valued team leader.

Mrs. Counce serves as relief Charge Nurse, and handles the heavy workload, problems, and daily stressors accurately, promptly, and with equanimity. Whenever acting as Charge Nurse, Mrs. Counce is responsible for monitoring emergency and routine ward equipment, and she utilizes available resources prudently. She deals well with physician staff and support staff, and is available to assist her colleagues, as necessary.

QUALITY OF CARE:

Mrs Counce independently developed an initial assessment tool to facilitate the accurate and prompt input of patient data into the Interdisciplinary Assessment and nursing care plan. After testing it, herself, she shared this effective, time-saving form to her peers. Development of this tool by Mrs. Counce has proven beneficial to Ward 2North, and eventually to staff who have floated to this unit. ther time, Mrs. Counce was concerned about the unstocked medicine carts, so she inventoried the contents, labeled, and filled the ;ues on all of the med carts on 2 North, resulting in improved efficiency and timeliness of medication administration.

RESEARCH:

After a work-related study of the current computer forms, Mrs. Counce developed an improved method of completing requisite CPRS forms for nurses documenting patient care. When Mrs. Counce was involved in a blood splash incident, she researched the use of safety goggles for health care providers, and brought information to facilitate the purchase of this safety apparatus by other nurses. She now consistently wears safety goggles, and is a role model for other staff members.

RESOURCE UTILIZATION:

Mrs. Counce inventoried the contents of the medicine carts, and then discussed her findings with the nurse manager, and other staff, in order to establish a restocking system of the critical items to facilitate safe medication administration. She labeled the drawer and bin contents, including desired number count, and posted this information so that others could accurately maintain appropriate quantities of supplies. She has set up a system that utilizes resources in the most cost-efficient and effective manner, while maintaining a high standard of pt care.

EDUCATION AND CAREER DEVELOPMENT:

Mrs Counce stays abreast of new nursing and medical issues by participating in continuing education courses at TVHS.

PERFORMANCE:

Mrs. Counce has been a role model, and is one of the preceptors for nurses who are new to 2North. She is supportive of her colleagues, and encouraging of new staff. I have received several compliments regarding her tact and patience in precepting new nurses.

COLLEGIALTY:

Mrs. Counce is an active team member, and is always ready to share ideas in staff meetings or patient-focused meetings. She is currently involved in completing her requisite continuing education hours. Mrs.Counce is active in attending or reviewing staff meeting minutes, and has been instrumental in setting up the computer forms necessary to improve compliance and maximize performance. Mrs. Counce can be relied upon to support new staff members, and to ease the stress of orientation to a new nursing unit. Her appraisals of peer performance are fair and reliable.

COLLABORATION:

·cent new nurse orienting to 2 North had a very difficult time in acquiring the nursing skills and self-confidence to feel secure on 2 .h. Mrs. Counce heard of the problems, and asked that the new nurse be placed on her weekend rotation so that she could assist this new staff member in orienting to 2 North, at a more comfortable pace, so that we have retained this valued new nurse.

APPENDIX E

SECTION C — RATING BY RATING OFFICIAL

INSTRUCTIONS

An objective rating will be assigned for each category. The objective ratings will reflect and summarize how the nurse meets the criteria stated in the Nurse VA Qualification Standard and appropriate functional statement.

LEGEND

UNSATISFACTORY — Has not met all criteria.
LOW SATISFACTORY — Has met all criteria, but at times performance marginal.
SATISFACTORY — Has met all criteria, at times exceeds expectations.
HIGH SATISFACTORY — Has met all criteria, usually exceeds expectations by a substantial margin.
OUTSTANDING — Has met all criteria, consistently exceeds expectations to an exceptional degree.

11. CATEGORY I — NURSING PRACTICE *(Demonstrates a level of professional nursing practice appropriate to grade and functional statement.)*

☐ UNSATISFACTORY ☐ LOW SATISFACTORY ☒ SATISFACTORY ☐ HIGH SATISFACTORY ☐ OUTSTANDING

12. Category II — interpersonal relationships *(Works effectively with individuals and groups at the level appropriate to grade and functional statement.)*

☐ UNSATISFACTORY ☐ LOW SATISFACTORY ☒ SATISFACTORY ☐ HIGH SATISFACTORY ☐ OUTSTANDING

SECTION D — OVERALL EVALUATION

13. OVERALL RATING — *(An objective appraisal of overall competency based on ratings in Section C. See DM&S Supplement MP-5, Part II, Chapter 6, Appendix 6A.)*

☐ UNSATISFACTORY ☐ LOW SATISFACTORY ☒ SATISFACTORY ☐ HIGH SATISFACTORY ☐ OUTSTANDING

14. ENTRIES ON THIS FORM ARE BASED ON:

☒ FREQUENT OR DAILY CONTACT
☐ INFREQUENT CONTACT
☐ INFREQUENT OBSERVATIONS OF WORK RESULTS
☒ FREQUENT OBSERVATIONS OF WORK RESULTS
☐ JOINT REVIEWED WITH: _____

NO. OF MONTHS UNDER MY SUPERVISION: 12

15. FOR FILLING PERMANENT NURSES RECEIVING A LOW SATISFACTORY OR UNSATISFACTORY RATING, HAS THE REQUIREMENT BEEN MET FOR ADVANCE COUNSELING DOCUMENTED IN WRITING? *(See DM&S Supplement MP-5, part II, Chapter 6.)*

☐ YES ☐ NO ☐ NOT APPLICABLE

17a. SIGNATURE OF RATING OFFICIAL	17b. POSITION	17c. DATE
Linda Wyatt, RN	Nurse Manager	06-02-02

SECTION E — COMMENTS OF APPROVING OFFICIAL

DISAGREEMENT WITH RATING, REFER TO DM&S, MP-5, PART II, CHAPTER 6, APPENDIX 6A.

Concur with Rating Official.

18a. SIGNATURE OF APPROVING OFFICIAL	18b. POSITION	18c. DATE
Marjorie Collins, RN	CNS	6/17/02

SECTION F — RATED EMPLOYEE

19a. SIGNATURE OF EMPLOYEE *(I have seen the approved rating and have had an opportunity to discuss it.)*	19b. DATE
Saundra J. Counce RN	8-9-02

NOTE: Employee comments concerning your rating may be submitted in writing to your supervisor and will be filed in your Official Personnel Folder under Board Action Folder.

PROFESSIONAL CAREER DEVELOPMENT PROGRAM — Nurses in career/trainee positions and nurses with a masters or higher degree will complete VA Forms 10-3247 and 10-3249a. Recipients of a VA Health Professional Scholarship will complete VA Form 10-3249a until obligated service is completed.

Veterans Administration

PROFICIENCY REPORT

SECTION A — INDIVIDUAL REPORTED ON

1. NAME (Last, First, Middle)	2. SOCIAL SECURITY	3. NAME AND LOCATION OF FACILITY	4. FACILITY NO.
COUNCE, SAUNDRA J		VA TN Healthcare System - Nashville Campus	626

5. GRADE/STEP	6. POSITION TITLE	7. PROBATIONARY REVIEW		8. PERIOD COVERED BY REPORT	
		DUE	COMPLETED	FROM	TO
1 14	NURSE			6-17-02	6-17-03

9. SERVICE	10. DATE OF BIRTH	11. SERVICE COMPUTATION DATE
NURSING SERVICE	10-17-49	6-17-01

SECTION B — NARRATIVE EVALUATION BY RATING OFFICIAL

INSTRUCTIONS: Document how the nurse meets the criteria noted in the VA Nurse Qualification Standards and appropriate functional statements, other significant professional contributions, and areas needing improvement. (The narrative evaluation should be limited to the space provided except in unusual circumstances.)

Practice: Mrs. Counce is an experienced nurse who continues to bring a high level of care and compassion with her to 2North. She is respected by new nursing staff, veteran nursing staff, her patients and their families. She serves as a resource for new staff and float staff on the weekends, helping to orient new staff to their responsibilities on this very busy telemetry unit. She is unfailingly courteous and supportive of the patients in her care, and makes age specific accommodations in a non-judgmental manner. I have personally received favorable comments about Mrs. Counce from staff and from patients and their families.

Quality of Care:
Mrs. Counce is self-motivated, and can be relied upon to provide high quality of nursing care. Mrs. Counce also steps beyond the expected, and offers assistance to others, on a regular basis. When Mrs. Counce noticed that weekend staff were away from the floor for lunch, and no one knew where, she devised and provided a sign-out board to improve communication. On another occasion, Mrs. Counce observed the delay in making patient care assignments because the Charge Nurse had to count and re-count the schedule. She designed and typed a list with all four shift assignments to facilitate accurate assignments, and charge nurse designation.

Research: Mrs. Counce assists in identifying problems in nursing practice on 2 North, and has inquired about the feasibility of upgrading the plumbing on 2 North to accommodate the multiple patients who are bedbound and dependent on use of bedpans. There is no functional mechanism to safely dispose of waste, and nurses often must carry waste through the halls. A system of red-bagging of soiled bedpans and urinals has been instituted.

source Utilization:
Mrs. Counce is aware of potential safety and efficiency issues on 2North, and acts in a prompt fashion to relieve the situation, and then discusses her concerns and her solutions with her nurse manager and other fellow staff members. Mrs. Counce continues to inventory and stock the medication carts on 2 North.

Education and Career Development:
Mrs. Counce is a very supportive and involved staff nurse, who acquits her team leader functions with diligence and determination. Team assignments are made in a fair and balanced way, and she is always available to assist her fellow team members. Mrs. Counce participates in staff meetings, inservice offerings, and continuing education programs, and has been preparing a, "Behavior in the Workplace" program.

Performance:
Mrs. Counce actively self-appraises her own nursing skills, and is willing to attend educational offerings on her free time. Mrs. Counce is attending the "Seven Habits of an Effective Person" programs, and has stated willingness to share what she has learned with other staff.

Collegiality: Mrs. Counce also appraises and monitors the nursing skills and quality of care provided by other nurses on 2 North, and shares her observations with the Nurse Manager. She has been very supportive of the new nursing orientees on 2 North. Mrs. Counce also serves as a role model and resource to the nurses joining 2 North staff.

Collaboration: Mrs. Counce works to maintain an atmosphere of shared responsibility and teamwork with members of the health care team, and is always available to offer advice to staff new on 2 North. She consults the Case Manager, Social Worker, and physician team members in her attempts to provide optimal care for all patients.

Ethics: While demonstrating respect for the rights of patients and families, Mrs. Counce has been the subject of several favorable comments from patients and their families. Mrs. Counce advocates for the civil, spiritual and ethnic individuality of those in her care, observes the age-specific approach to multivariant patients.

SECTION C — RATING BY RATING OFFICIAL

INSTRUCTIONS

An objective rating will be assigned for each category. The objective ratings will reflect and summarize how the employee meets the criteria stated in the Nurse VA Qualification Standard and appropriate functional statement.

LEGEND
UNSATISFACTORY — Has not met all criteria.
LOW SATISFACTORY — Has met all criteria, but at times performance marginal.
SATISFACTORY — Has met all criteria, at times exceeds expectations.
HIGH SATISFACTORY — Has met all criteria, usually exceeds expectations by a substantial margin.
OUTSTANDING — Has met all criteria, consistently exceeds expectations to an exceptional degree.

11. CATEGORY I — NURSING PRACTICE *(Demonstrates a level of professional nursing practice appropriate to grade and functional statement.)*

☐ UNSATISFACTORY ☐ LOW SATISFACTORY ☒ SATISFACTORY ☐ HIGH SATISFACTORY ☐ OUTSTANDING

12. Category II — Interpersonal relationships *(Works effectively with individuals and groups at the level appropriate to grade and functional statement.)*

☐ UNSATISFACTORY ☐ LOW SATISFACTORY ☒ SATISFACTORY ☐ HIGH SATISFACTORY ☐ OUTSTANDING

SECTION D — OVERALL EVALUATION

13. OVERALL RATING — *The objective appraisal of over all competence based on rating in Section C, See DM&S Supplement MP-5, Part II, Chapter 6, Appendix 6A)*

☐ UNSATISFACTORY ☐ LOW SATISFACTORY ☒ SATISFACTORY ☐ HIGH SATISFACTORY ☐ OUTSTANDING

14. ENTRIES ON THIS FORM ARE BASED ON:

☒ FREQUENT OR DAILY CONTACT
☐ INFREQUENT CONTACT
☒ FREQUENT OBSERVATIONS OF WORK RESULTS
☐ JOINT REVIEWED WITH: _____
☐ INFREQUENT OBSERVATIONS OF WORK RESULTS

NO. OF MONTHS UNDER MY SUPERVISION: 12

15. FOR FULL-TIME PERMANENT NURSES RECEIVING A LOW SATISFACTORY OR UNSATISFACTORY RATING, HAS THE REQUIREMENT BEEN MET FOR ADVANCE COUNSELING DOCUMENTED IN WRITING? *(See DM&S Supplement MP-5, Part II, Chapter 6.)*

☐ YES ☐ NO ☐ NOT APPLICABLE

16a. SIGNATURE OF RATING OFFICIAL	16b. POSITION	16c. DATE
Linda Wyatt, RN, MSN	Nurse Manager	05/20/03

SECTION E — COMMENTS OF APPROVING OFFICIAL

IF AN DISAGREEMENT WITH RATING, REFER TO DM&S, MP-5, PART II, CHAPTER 6, APPENDIX 6A.

Concur with Rating Official.

18a. SIGNATURE OF APPROVING OFFICIAL	18b. POSITION	18c. DATE
Scott Erwin, RN, PhD	ACNS	

SECTION F — RATED EMPLOYEE

19a. SIGNATURE OF EMPLOYEE *(I have seen the appraisal rating and have had the opportunity to discuss it.)*	19b. DATE

NOTE: Comments concerning your rating may be submitted in writing to your supervisor and will be filed in your Official Personnel Folder and/or Board Action Folder.

PROFESSIONAL CAREER DEVELOPMENT PROGRAM — Nurses in specialized positions and nurses with a masters or higher degrees will complete VA Forms 10-5349 and 10-5349a. Recipients of a VA Health Professional Scholarship will complete VA Form 10-5349a and obligated service is completed.

I have been provided with the following VA Form (s) ☐ 10-5349 ☐ 10-5349a

In Lieu of VA FORM 10-2623

Veterans Administration

PROFICIENCY REPORT

SECTION A — INDIVIDUAL REPORTED ON

1. NAME (Last, First, Middle)	2. SOCIAL SECURITY	3. NAME AND LOCATION OF FACILITY	4. FACILITY NO
COUNCE, SAUNDRA J		VA TN Healthcare System - Nashville Campus	626

5. GRADE/STEP	6. POSITION TITLE	7. PROBATIONARY REVIEW		8. PERIOD COVERED BY REPORT	
		DATE	(COMPLETED)	FROM	TO
I 14	NURSE			6-17-02	6-17-03

9. SERVICE	10. DATE OF BIRTH	11. SERVICE COMPUTATION DATE
NURSING SERVICE	10-17-49	6-17-01 Received 8-17-03 3PM

SECTION B — NARRATIVE EVALUATION BY RATING OFFICIAL

INSTRUCTIONS: Document how the nurse meets the criteria stated in the VA Nurse Qualification Standards and appropriate functional statements, other significant professional considerations, and areas needing improvement. (The narrative evaluation should be limited to the space provided except in unusual circumstances.)

Practice: Ms. Counce is an experienced nurse, with several years of varied assignments in healthcare. Currently, Ms. Counce is assigned as a staff nurse on a 44-bed medical/surgical unit. She has also worked as a team leader on the weekend. Ms. Counce has difficulty in managing and delivering care in an efficient and timely manner. For example: Ms. Counce was assigned a compromised patient who did not receive timely, usual, and customary care for such a patient. Additionally, family complaints were verbalized regarding the lack of patient care and her lack of interpersonal attention to voiced concerns and needs. Pt's daughter discovered pt. alone and weeping, in this condition.

Quality of Care: Ms. Counce has not participated in data collection, analysis, and recommendations relating to nursing practice during this interval, but has focused her attention on perceived bullying behaviors by fellow staff nurses in the workplace (2 North). Earlier, Ms. Counce had devised a form to clarify nursing assignments, which was tested on 2 North, but which was eventually eliminated at general staff request, because it was misleading when not maintained. It became more of an additional form to complete, than help.

Research: Ms. Counce expended much time and effort researching, "Bullying in the Workplace", a presentation, which she felt, would end the unwanted behaviors of other staff members toward her. Unfortunately, her presentation included a printout of a website article of "Dr. Phil's Advice" page entitled, " Anti-Bullying Pledge-Faculty". This presentation did not reflect research based literature, rather it was based on the website of the psychologist from the "Oprah Show".

Resource Utilization: She generally makes team assignments for other team members that are reasonable, but is not an active participant in the care planning or discharge planning of her patients. For example, she incorporated "cut and paste" in her documentation to the extent that her notes were not reflective of an ongoing assessment of the patient over a period of several days of c. When this was detected by the chart auditor, and brought to Ms. Counce's attention, she replied that she did not have time to enter something new every time.

Education and Career Development: Ms. Counce has actively sought involvement in educational presentations by the Education Department, including: "Seven Habits of Highly Effective People", and the VALO project where she pursued her interest in self-improvement courses.

Performance: Ms. Counce has a chronic problem with organization and prioritization of care, and usually stays over after the shift is over to complete her documentation. When questioned about the need to stay over five hours after the completion of her shift to enter standard documentation, she became very upset, and stated that she just knew that she would be criticized, so she completed her charting meticulously. When a family member asked why the patient's medications were given at 11:25 AM instead of at 9:00 AM, as ordered, Ms. Counce replied that she had a 2hour window in which to give meds, so she was only 20 minutes late-" not a big deal." In fact, the two-hour window starts one hour before the med is due, and ends one hour after it is due, so she was almost 1-½ hours late with the medications.

Collegiality: Ms. Counce is very willing to critique the nursing care of her fellow nurses, but does not scrutinize her own nursing practice as carefully. For example, she cited another staff nurse who was slow in passing medications, but it was discovered that Ms Counce routinely scanned all medications early in the morning so that they appear to have been given in a timely fashion, but then gave the medications to a family member to administer 3.5 hours after scanned into BCMA as "given".

Collaboration: Ms. Counce consults the team physicians when necessary, but has not developed sound interpersonal skills to deal with other health care providers. For example, after she decided that there were bullying behaviors on 2 N, she copied an anti-bullying article off a "Dr. Phil" website, and put it into all the 2 N mailboxes. It was an article that stated, "Place sanctions for bullying such as removal from a classroom or school, a parent teacher meeting, and detention or expulsion." When her concerns were discussed, it was stipulated that any presentation was subject to prior approval by Nurse Manager. Many employees voiced their anger at finding this material in their mailboxes, and it was generally viewed as inappropriate and condescending.

Ethics: Ms. Counce did not demonstrate nursing ethics when she left her patient in a diarrhea-filled, bed, unbathed, and nude. Both pt and family were humiliated by this degrading incident, and this patient's daughter said, "Illness had taken away a lot of things, but he had not lost his dignity until she left him nude, soiled, and exposed." Ms. Counce stated that she could not understand why this would led patient abuse. Neither did she act ethically when she placed unapproved materials in 2N mailboxes, in a direct act of ordination.

SECTION C — RATING BY RATING OFFICIAL

INSTRUCTIONS

An adjective rating will be assigned for each category. The adjective ratings will reflect and summarize how the employee meets the criteria stated in the Nurse VA Qualification Standard and appropriate functional statement.

LEGEND
UNSATISFACTORY — Has not met all criteria
LOW SATISFACTORY — Has met all criteria, but at times performance marginal
SATISFACTORY — Has met all criteria, at times exceeds expectations.
HIGH SATISFACTORY — Has met all criteria, usually exceeds expectations by a substantial margin.
OUTSTANDING — Has met all criteria, consistently exceeds expectations to an exceptional degree.

11. CATEGORY I — NURSING PRACTICE *(Demonstrates a level of professional nursing practice appropriate to grade and functional statement.)*

☐ UNSATISFACTORY ☒ LOW SATISFACTORY ☐ SATISFACTORY ☐ HIGH SATISFACTORY ☐ OUTSTANDING

12. Category II — interpersonal relationships *(Works effectively with individuals and groups at the level appropriate to grade and functional statement.)*

☐ UNSATISFACTORY ☒ LOW SATISFACTORY ☐ SATISFACTORY ☐ HIGH SATISFACTORY ☐ OUTSTANDING

SECTION D — OVERALL EVALUATION

13. OVERALL RATING — *(An adjective appraisal of overall competency based on rating in Section C. See DM&S Supplement, MP-5, Part II, Chapter 6, Appendix 6A)*

☐ UNSATISFACTORY ☒ LOW SATISFACTORY ☐ SATISFACTORY ☐ HIGH SATISFACTORY ☐ OUTSTANDING

14. ENTRIES ON THIS FORM ARE BASED ON:

☒ FREQUENT OR DAILY CONTACT
☐ INFREQUENT CONTACT
☐ INFREQUENT OBSERVATIONS OF WORK RESULTS
☒ FREQUENT OBSERVATIONS OF WORK RESULTS
☐ JOINT REVIEW HELD WITH _____

NO. OF MONTHS UNDER MY SUPERVISION: 12

15. FOR FULL-TIME PERMANENT NURSES RECEIVING A LOW SATISFACTORY OR UNSATISFACTORY RATING, HAS THE REQUIREMENT BEEN MET FOR ADVANCE COUNSELING DOCUMENTED IN WRITING? *(See Exhibit 6A-1, part E, Chapter 6)*

☐ YES ☐ NO ☐ NOT APPLICABLE

15a. SIGNATURE OF RATING OFFICIAL	15b. POSITION	15c. DATE
Linda Wyatt, RN, MSN	Nurse Manager	6/20/03

SECTION E — COMMENTS OF APPROVING OFFICIAL

IF IN DISAGREEMENT WITH RATING, REFER TO DM&S, MP-5, PART II, CHAPTER 6, APPENDIX 6A.

Concur with Rating Official.

16a. SIGNATURE OF APPROVING OFFICIAL	16b. POSITION	16c. DATE
Scott Emair, RN, PhD	ACNS	6-20-03

SECTION F — RATED EMPLOYEE

17a. SIGNATURE OF EMPLOYEE *(I have seen the approved rating and have had the opportunity to discuss it.)*	17b. DATE

NOTE: Concise comments concerning your rating may be submitted in writing to your supervisor and will be filed in your Official Personnel Folder and/or Board Action Folder.

PROFESSIONAL CAREER DEVELOPMENT PROGRAM — Nurses in consultant positions and nurses with a masters or higher degrees will complete VA Forms 10-5349 and 10-5349a. Recipients of a VA Health Professional Scholarship will complete VA Form 10-5349b until obligated service is completed.

Were provided with the following VA Form (s): ☐ 10-5349 ☐ 10-5349a

In Lieu of VA FORM 10-2623

PROFICIENCY REPORT

SECTION A — INDIVIDUAL REPORTED ON

1. NAME (Last, First, Middle)	2. SOCIAL SECURITY	3. NAME AND LOCATION OF FACILITY	4. FACILITY NO.
COUNCE, SAUNDRA J		VA TN Healthcare System - Nashville Campus	626

5. GRADE/STEP	6. POSITION TITLE	7. PROBATIONARY REVIEW		8. PERIOD COVERED BY REPORT	
		(Initial)	(Month, year)	FROM	TO
1 14	NURSE			6-17-02	6-17-03

9. SERVICE	10. DATE OF BIRTH	11. SERVICE COMPUTATION DATE
NURSING SERVICE	10-17-49	6-17-01

SECTION B — NARRATIVE EVALUATION BY RATING OFFICIAL

INSTRUCTIONS: Document how the nurse meets the criteria stated in the VA Nurse Qualification Standards and appropriate functional statement, other significant professional contributions, and areas needing improvement. (The narrative evaluation should be limited to the space provided except in unusual circumstances.)

Practice: Ms. Counce is an experienced nurse, with several years of varied assignments in healthcare. Currently, Ms. Counce is assigned as a staff nurse on a 44-bed medical/surgical unit. She has also worked as a team leader on the weekend. Ms. Counce has difficulty in managing and delivering care in an efficient and timely manner. For example: Ms. Counce was assigned a compromised patient who did not receive timely, usual, and customary care for such a patient. Additionally, family complaints were verbalized regarding the lack of patient care and her lack of interpersonal attention to voiced concerns and needs. Pt's daughter discovered pt, alone and weeping, in this condition.

Quality of Care: Ms. Counce has not participated in data collection, analysis, and recommendations relating to nursing practice during this interval, but has focused her attention on perceived bullying behaviors by fellow staff nurses in the workplace (2 North). Earlier, Ms. Counce had devised a form to clarify nursing assignments, which was tested on 2 North, but which was eventually eliminated at general staff request because it was misleading when not maintained. It became more of an additional form to complete, than help.

Research: Ms. Counce expended much time and effort researching, "Bullying in the Workplace", a presentation, which she felt, would end the unwanted behaviors of other staff members toward her. Unfortunately, her presentation included a printout of a website article of "Dr. Phil's Advice" page entitled, " Anti-Bullying Pledge-Faculty". This presentation did not reflect research based literature, rather it was based on the website of the psychologist from the "Oprah Show".

Resource Utilization: She generally makes team assignments for other team members that are reasonable, but is not an active participant in the care planning or discharge planning of her patients. For example, she incorporated "cut and paste" in her documentation to the extent that her notes were not reflective of an ongoing assessment of the patient over a period of several days of care. When this was detected by the chart auditor, and brought to Ms. Counce's attention, she replied that she did not have time to enter something new every time.

Education and Career Development: Ms. Counce has actively sought involvement in educational presentations by the Education Department, including: "Seven Habits of Highly Effective People", and the VALO project where she pursued her interest in self-improvement courses.

Performance: Ms. Counce has a chronic problem with organization and prioritization of care, and usually stays over after the shift is over to complete her documentation. When questioned about the need to stay over five hours after the completion of her shift to enter standard documentation, she became very upset, and stated that she just knew that she would be criticized, so she completed her charting meticulously. When a family member asked why the patient's medications were given at 11:25 AM instead of at 9:00 AM, as ordered, Ms. Counce replied that she had a 2hour window in which to give meds, so she was only 20 minutes late- " not a big deal." In fact, the two-hour window starts one hour before the med is due, and ends one hour after it is due, so she was almost 1-½ hours late with the medications.

Collegiality: Ms. Counce is very willing to critique the nursing care of her fellow nurses, but does not scrutinize her own nursing practice as carefully. For example, she cited another staff nurse who was slow in passing medications, but it was discovered that Ms Counce routinely scanned all medications early in the morning so that they appear to have been given in a timely fashion, but then gave the medications to a family member to administer 1.5 hours after scanned into BCMA as "given".

Collaboration: Ms. Counce consults the team physicians when necessary, but has not developed sound interpersonal skills to deal with other health care providers. For example, after she decided that there were bullying behaviors on 2 N, she copied an anti-bullying article off a "Dr. Phil" website, and put it into all the 2 N mailboxes. It was an article that stated, "Place sanctions for bullying such as removal from a classroom or school, a parent teacher meeting, and detention or expulsion." When her concerns were discussed, it was stipulated that any presentation was subject to prior approval by Nurse Manager. Many employees voiced their anger at finding this material in their mailboxes, and it was generally viewed as inappropriate and condescending.

Ethics: Ms. Counce did not demonstrate nursing ethics when she left her patient in a diarrhea-filled, bed, unbathed, and nude. Both pt and family were humiliated by this degrading incident, and this patient's daughter said, "Illness had taken away a lot of things, but he had not lost his dignity until she left him nude, soiled, and exposed." Ms. Counce stated that she could not understand why this would be called patient abuse. Neither did she act ethically when she placed unapproved materials in 2N mailboxes in a direct act of insubordination.

SECTION C — RATING BY RATING OFFICIAL

INSTRUCTIONS

An adjective rating will be assigned for each category. The adjective ratings will reflect and summarize how the nurse meets the criteria stated in the Nurse VA Qualification Standard and appropriate functional statement.

LEGEND
UNSATISFACTORY — Has not met all criteria.
LOW SATISFACTORY — Has met all criteria, but at times performance marginal.
SATISFACTORY — Has met all criteria, at times exceeds expectations.
HIGH SATISFACTORY — Has met all criteria, usually exceeds expectations by a substantial margin.
OUTSTANDING — Has met all criteria, consistently exceeds expectations to an exceptional degree.

11. CATEGORY I — NURSING PRACTICE *(Demonstrates a level of professional nursing practice appropriate to grade and functional statement.)*

☐ UNSATISFACTORY ☒ LOW SATISFACTORY ☐ SATISFACTORY ☐ HIGH SATISFACTORY ☐ OUTSTANDING

12. Category II — Interpersonal relationships *(Works effectively with individuals and groups at the level appropriate to grade and functional statement.)*

☐ UNSATISFACTORY ☒ LOW SATISFACTORY ☐ SATISFACTORY ☐ HIGH SATISFACTORY ☐ OUTSTANDING

SECTION D — OVERALL EVALUATION

13. OVERALL RATING — *(An objective appraisal of overall competency based on rating in Section C. See DMAS Supplement MP-5, Part II, Chapter 6, Appendix 6A)*

☐ UNSATISFACTORY ☒ LOW SATISFACTORY ☐ SATISFACTORY ☐ HIGH SATISFACTORY ☐ OUTSTANDING

14. ENTRIES ON THIS FORM ARE BASED ON:

☒ FREQUENT OR DAILY CONTACT
☐ INFREQUENT CONTACT
☐ INFREQUENT OBSERVATIONS OF WORK RESULTS
☒ FREQUENT OBSERVATIONS OF WORK RESULTS
☐ JOINT REVIEWED WITH:

NO. OF MONTHS UNDER MY SUPERVISION: 12

16. FOR ALL THOSE PERMANENT NURSES RECEIVING A LOW SATISFACTORY OR UNSATISFACTORY RATING, HAS THE REQUIREMENT BEEN MET FOR ADVANCE COUNSELING DOCUMENTED IN WRITING? *(See DMAS Supplement MP-5, part II, Chapter 6.)*

☐ YES ☐ NO ☐ NOT APPLICABLE

17a. SIGNATURE OF RATING OFFICIAL	17b. POSITION	17c. DATE
Linda Wyatt, RN, MSN *Linda Wyatt, R.N., MSN*	Nurse Manager	6/20/03

SECTION E — COMMENTS OF APPROVING OFFICIAL

IF IN DISAGREEMENT WITH RATING, REFER TO DMAS MP-5, PART II, CHAPTER 6, APPENDIX 6A.

Concur with Rating Official

18a. SIGNATURE OF APPROVING OFFICIAL	18b. POSITION	18c. DATE
Scott Erwin, RN, PhD *Scott Erwin*	ACNS	8-21-03

SECTION F — RATED EMPLOYEE

19a. SIGNATURE OF EMPLOYEE *(I have seen the appraisal rating and have had the opportunity to discuss it.)*	19b. DATE
My Comments attached. Being a professional I do	8-21-03

NOTE: Concise comments concerning this rating may be submitted. Attached to your supervisor and will be filed in your Official Personnel Folder and/or Board Action Folder.

PROFESSIONAL CAREER DEVELOPMENT PROGRAM — Nurses in commissioned positions and nurses with a masters or higher degrees will complete VA Forms 10-5349 and 10-5349a; Recipients of a VA Health Professional Scholarship will complete VA Form 10-5349a until obligated service is completed.

I have been provided with the following VA Form (s): ☐ 10-5349 ☐ 10-5349a

In Lieu of VA FORM 10-2623

APPENDIX G

Department of Veterans Affairs — Memorandum

Date: August 1, 2003

From: Chairperson, Nurse Professional Standards Board

Subj: Summary Probationary Review and Convening of the Nurse Professional Standards Board To: Saundra Counce. RN (626/318N)

1. This is to notify you that a Nurse Professional Standards Board (NPSB) will be convened on August 21, 2003 at 9:30 am in the Administrative Conference Room, Director's Suite, first floor, Nashville Campus, to conduct a summary review of your performance and conduct during your probationary period and make recommendations concerning your retention in or separation from the Veterans Health Administration. The review is being held pursuant to 38 U.S.C. (United States Code) section 7403(b), and will be based upon available records and information furnished by you and others who may be called by the NPSB.

2. The NPSB is to review the following alleged deficiencies in your performance and conduct:

> Falsification of medical records related to medication administration, insubordination (failure to report to duty, not training, as directed by the Nurse Manager), and failure to follow acceptable nursing standards of care and practice related to patient care.

3. You are entitled to:

a. Review documents relied upon in initiating or recommending this summary Board review, subject to applicable disclosure restrictions;

b. An impartial review by the NPSB;

c. Respond orally and/or in writing to the NPSB concerning the reasons for the review; and

d. Be represented by an individual of your choice, provided the choice would not create a conflict of interest. This is not an adversarial proceeding so your representative's role will be limited to assisting you in exercising your right to respond orally and/or in writing to the reasons for the review. However, any response to a request for information from the NPSB during its review is considered a part of your reply. Accordingly, your representative may assist you in these matters.

4. Please notify me by August 15, 2003 whether you will attend the NPSB meeting in person, a written statement, or both. Please include in your notice the name, address, and occupation of your representative, should you choose to have one. If you wish to submit a written statement to the Board, it is also to be submitted to me by the above date.

5. After review, the NPSB will forward its recommendations through the Chief of Staff, to the Director, Mr. David Pennington, for final decision. If the NPSB finds you not to be fully qualified and satisfactory, your separation will be recommended. You will be advised of the results of this review in writing.

6. Additional information about these procedures maybe obtained by contacting Mr. Lee S. Danielson,

Employee/Labor Relations Specialist, Human Resources Management Service, Nashville Campus, Room 1-D112, or at extension 6371.

/s/ Sharon Krajnak
Sharon Krajnak,

cc: Chief, Human Resources (05)
Nurse Executive (118)

APPENDIX H

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-2450

MASOOD N. KHAN,
Plaintiff-Appellant,

v.

TOGO D. WEST, JR.,
Secretary of Department of Veteran Affairs,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte.
Richard L. Voorhees, District Judge.
(CA-99-186-3-V)

Argued: April 5, 2001

Decided: May 7, 2001

Before WILKINSON, Chief Judge, MOTZ, Circuit Judge, and Patrick M. DUFFY, United States District Judge for the District of South Carolina, sitting by designation.

Reversed by unpublished per curiam opinion.

COUNSEL

ARGUED: Louis L. Lesesne, Jr., LESESNE & CONNETTE, Charlotte, North Carolina, for Appellant. James Michael Sullivan, Assistant United States Attorney, Charlotte, North Carolina, for Appellee.

ON BRIEF: Mark T. Calloway, United States Attorney, Charlotte, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Plaintiff Masood Khan is a permanent employee of the United States Department of Veterans Affairs ("VA"). In this case, Khan sought a declaration that his previous service as a temporary VA employee satisfied the two-year probationary period required of all permanent VA employees under 38 U.S.C. § 7403. The district court ruled against Khan on the grounds that such an interpretation of Section 7403 would yield absurd results. *See Khan v. West*, 122 F. Supp. 2d 596 (W.D.N.C. 2000). Because a plain reading of the statutory text indicates that Khan has already served his probationary period, we must reverse the judgment.

I.

Beginning in 1983, Dr. Masood Khan was employed as a physician by the United States Department of Veterans Affairs ("VA"). Khan served at the VA Medical Center in Salisbury, North Carolina. Prior to 1996, Khan was not a United States citizen. Therefore, his employment was on a full-time temporary (year-to-year) basis pursuant to 38 U.S.C.

§§ 7405 and 7407. In 1994, the VA did not renew Khan's employment contract. In response, Khan initiated a claim of discrimination based on race, religion, and national origin under § 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16. Khan prevailed in a subsequent administrative proceeding when the VA issued a final agency decision holding that Kahn was the victim of illegal discrimination. Pursuant to this decision, the VA notified Khan that he was permanently assigned to work as a cardiologist in the VA facility in Walla Walla, Washington. Khan had become an American citizen in 1996, and he was therefore eligible for permanent employment. However, Khan initiated this lawsuit because he sought to remain at a VA facility in North Carolina.

The parties resolved this dispute by entering into a Settlement Agreement on February 9, 2000. Under the terms of the Agreement, the VA was to appoint Khan to a full-time permanent position of Staff Physician at the VA facility in Salisbury, North Carolina. This appointment was effective as of February 13, 2000. Under the Settlement Agreement, the VA also was to give Khan "credit for his temporary service as if his employment had never been interrupted from July 31, 1983 through the effective date of his full-time appointment, to wit: February 13, 2000."

Following his reinstatement, the VA notified Khan that he was subject to completion of a two-year probationary period, beginning February 13, 2000. The VA informed Khan that this probationary period was required of all permanent VA employees pursuant to 38 U.S.C. § 7403. Khan claimed, however, that his previous service as a temporary employee

satisfied Section 7403's probationary requirement. Khan sought a declaration from the district court that the VA had violated the terms of the Settlement Agreement by subjecting him to what was, in his view, an additional probationary period.

The district court agreed that the plain language of Section 7403 seemed to recognize Khan's previous service for purposes of the probationary period. *See Khan*, 122 F. Supp. 2d at 598. However, the court held that because such a reading of Section 7403 would yield an absurd result, it would deny Khan's motion. *Id.* Khan now appeals.

II.

Section 7403 creates a two-year probationary period for certain VA employees. *See* 38 U.S.C. § 7403.[1] Sec-

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[1] 38 U.S.C. § 7403 states, in relevant part:

> (a)(1) Appointments under this chapter of healthcare professionals to whom this section applies may be made only after qualifications have been satisfactorily established in accordance with regulations prescribed by the Secretary, without regard to civil-service requirements.
>
> (2) This section applies to the following persons appointed under this chapter:
>
> (A) Physicians.
>
> (B) Dentists.
>
> (C) Podiatrists.
>
> (D) Optometrists.
>
> (E) Nurses.
>
> (F) Physician assistants.
>
> (G) Expanded-function dental auxiliaries.
>
> (b)(1) Appointments described in subsection (a) shall be for a probationary period of two years.

38 U.S.C. § 7403.

tion 7403 states that the probationary period applies to physicians, among others, who are "appointed under this chapter." 38 U.S.C. § 7403(a)(2), (b)(1). The "under this chapter" language in Section 7403(a)(2) refers to Chapter 74 of Title 38, of which Section 7403 is a part. Khan was appointed under 38 U.S.C. §§ 7405 and 7407, both of which are also part of Chapter 74. Therefore, a plain reading of the statute indicates that Section 7403 and its accompanying probationary period applied to Khan's service as a temporary employee. Accordingly, Khan has long ago concluded his probationary period as a result of his seventeen years of temporary employment.

The VA contends that this reading of Section 7403 is incorrect. The VA does not argue that its interpretation of Section 7403 is due deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Rather, the VA presents a textual argument that Section 7403 only applies to permanent employees. Section 7403 itself in no way differentiates between permanent and temporary employees. However, the VA contends that Section 7401, which provides for the appointments of certain VA physicians,[2] is limited to permanent employees. Even assuming this to be true, the lan-

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[2] 38 U.S.C. § 7401 states, in relevant part:

> There may be appointed by the Secretary such personnel as the Secretary may find necessary for the medical care of veterans (in addition to those in the Office of the Under Secretary for Health appointed under section 7306 of this title), as follows:
>
> (1) Physicians, dentists, podiatrists, optometrists, registered nurses, physician assistants, and expanded-function dental auxiliaries.

38 U.S.C. § 7401.

guage of Section 7403 is not limited to employees appointed under Section 7401. Rather, by its very terms, Section 7403 applies to all physicians "appointed under this chapter." *See* 38 U.S.C. § 7403(a)(2). While Khan may have been appointed under Section 7405 rather than Section 7401, both sections fall under Chapter 74. Therefore, Section 7403's probationary period began to run when Khan was first appointed under Section 7405.

Finally, while it may seem odd to require temporary employees to serve a two-year probationary period, interpreting Section 7403 in this way does not yield an absurd result. In fact, the statute might have been designed to apply to situations exactly like this one—namely, where a long-serving temporary employee is promoted to permanent-employee status. In such cases, Congress may have concluded that an additional two-year probationary period would be unnecessary since the temporary employee would have already served for an extended period under the VA's supervision. In all events, we shall apply the statute as Congress wrote it.

III.

For the foregoing reasons, the judgment of the district court is

REVERSED.

APPENDIX I

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed Nov 12, 2009]

No. 08-5031

SAUNDRA J. COUNCE,
Plaintiff-Appellant,

v.

SECRETARY OF THE UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS,
Defendant-Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE

ORDER

Before: MOORE, CLAY, and KETHLEDGE, Circuit Judges,

Saundra J. Counce, proceeding pro se, appeals a district court order directing a verdict for defendant in her action filed pursuant to 42 U.S.C. § 1983 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, alleging employment discrimination. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit.

Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Counce, a fifty-six-year-old Hispanic female, began work for defendant as a staff nurse on June 17, 2001, under a temporary appointment. In April 2002, her position was converted to a permanent appointment, subject to a two-year period of probation. On July 7, 2003, Counce's supervisor requested her termination based, primarily, on an incident that occurred in June 2003 involving patient care. Counce's performance and conduct were subsequently reviewed before the Nurse Professional Standards Board which found Counce accountable for falsification of medical records relating to medication administration, failure to follow acceptable nursing standards of care, and insubordination, Counce was terminated as of October 3, 2003.

Counce filed her complaint in district court in February 2006, alleging the following claims: employment discrimination based on race, sex, and age; hostile work environment; violation of privacy rights; and retaliation. Counce's retaliation claim centered around an allegation that she was fired because she had complained about workplace bullying and suggested that the bullying might have been motivated by her Hispanic background. The defendant filed a motion to dismiss or, alternatively, for summary judgment. The district court granted the motion as to all claims except the claim of retaliation; the case proceeded to trial on this claim. Following the presentation of evidence, the district court granted defendant judgment as a matter of law and dismissed the action. Although Counce's briefs to this court are difficult to parse, it appears that she challenges

on appeal the district court's decision granting a directed verdict against her on the retaliation claim.

We review the grant or denial of a directed verdict by the trial court under the same standard used by that court in determining whether or not it was appropriate to grant the motion. *Lewis v. City of Irvine*, 899 F.2d 451, 454 (6th Cir. 1990). The court must, without weighing the credibility of the witnesses, ascertain whether the record contains sufficient evidence from which the jury could find in favor of the party against whom the motion is made. *Id.*

Applying that standard here, we conclude that the district court did not err in directing a verdict against Counce on her retaliation claim. As the district court correctly observed, a plaintiff in a retaliation case must demonstrate "a causal connection between the protected activity and the adverse employment action." *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000). Although the district court patiently permitted Counce to reopen the record several times, she introduced no evidence of a connection between her termination and her complaints about workplace bullying. Judgment as a matter of law was therefore appropriate.

The judgment of the district court is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed Apr 01, 2010]

No. 08-5031

SAUNDRA J. COUNCE,
Plaintiff-Appellant,

v.

SECRETARY OF THE UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS,
Defendant-Appellee.

ORDER

Before: MOORE, CLAY, and KETHLEDGE, Circuit Judges.

Saundra J. Counce, proceeding *pro se*, moves this court to clarify its order of November 11, 2009, to resolve her jurisdictional claim. The November 11, 2009, order affirmed the order of the district court directing a verdict for defendant in Counce's action filed pursuant to 42 U.S.C. § 1983 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, alleging employment discrimination. Additionally, Counce requests that this court grant her forty-five days from the time it rules on her motion for clarification in which to file a motion for rehearing. We construe Counce's motion to clarify as a timely petition for rehearing. *See United States v. James*, 555 F.3d 563, 563 (7th Cir.), *cert. denied*, 129 S. Ct. 2035 (2009).

In her motion, Counce argues that the Nurse Professional Standards Board, which found that Counce falsified medical records and failed to follow acceptable nursing standards of care, lacked jurisdiction to review her employment performance. The record clearly indicates that Counce was still under a two-year probationary period, measured from her starting date as a permanent employee, when she was brought before the Nurse Professional Standards Board. Thus, she was subject to its jurisdiction. *See* 38 U.S.C. § 7403(b)(1) and (2).

Further, after reviewing this court's prior decision, it does not appear that the panel overlooked or misapprehended any point of law or fact. *See* Fed. R. App. P. 40(a). Accordingly, Counce's motion to clarify construed as a petition for rehearing is denied, and her request for an extension in which to file a petition for rehearing is denied as moot.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk